No. 14-1516

Title:	Stephen Duncan, Warden, Petitioner
	v.
	Lawrence Owens
Docketed:	June 24, 2015
Linked with 14A1074	
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Nos.:	(14-1419)
Decision Date:	March 23, 2015

Questions Presented

—Date—	——Proceedings and Orders----------
Apr 21 2015	Application (14A1074) to recall and stay mandate pending the filing and disposition of a petition for a writ of certiorari, submitted to Justice Kagan.
Apr 24 2015	Response to application 14A1074 requested by Justice Kagan, due Friday, May 1, 2015, by 5 p.m ET.
Apr 30 2015	Response to application from respondent Lawrence Owens filed.
May 4 2015	Reply of applicant Stephen Duncan, Warden filed.
May 11 2015	Application (14A1074) denied by Justice Kagan.
Jun 17 2015	Application (14A1290) to extend the time to file a petition for a writ of certiorari from June 21, 2015 to July 15, 2015, submitted to Justice Kagan.
Jun 22 2015	Petition for a writ of certiorari filed. (Response due July 24, 2015)
Jun 24 2015	Application (14A1290) granted by Justice Kagan extending the time to file until July 15, 2015.
Jul 14 2015	Waiver of right of respondent Lawrence Owens to respond filed.
Jul 22 2015	DISTRIBUTED for Conference of September 28, 2015.
Jul 24 2015	Response Requested . (Due August 24, 2015)
Jul 29 2015	Application (15A111) to recall and stay mandate pending the disposition of the petition for a writ of certiorari, submitted to Justice Kagan.
Jul 30 2015	Application (15A111) denied by Justice Kagan.
Aug 4 2015	Application (15A111) refiled and submitted to Justice Scalia.
Aug 13 2015	Application (15A111) referred to the Court.
Aug 13 2015	Application (15A111) denied by the Court.
Aug 24 2015	Brief of respondent Lawrence Owens in opposition filed.
Sep 8 2015	Reply of petitioner Stephen Duncan, Warden filed. (Distributed)
Sep 9 2015	DISTRIBUTED for Conference of September 28, 2015.
Oct 1 2015	Petition GRANTED.
Oct 30 2015	Application (15A475) to recall and stay the mandate of the United States Court of Appeals for the Seventh Circuit pending the sending down of the judgment of this Court, submitted to Justice Kagan.

Nov 2 2015	Response to application (15A475) requested by Justice Kagan. (Due Friday, November 6, 2015, by 4 p.m. EST.)
Nov 6 2015	Response to application from respondent Lawrence Owens filed.
Nov 10 2015	Reply of applicant Stephen Duncan, Warden filed.
Nov 13 2015	Application (15A475) referred to the Court.
Nov 13 2015	Application (15A475) granted by the Court. The application to recall and stay the mandate of the United States Court of Appeals for the Seventh Circuit in case No. 14-1419, presented to Justice Kagan and by her referred to the Court, is granted pending the sending down of the judgment of this Court. The request seeking that the respondent be returned to applicant◆s custody pending final disposition of this case is denied, thus leaving that determination for the state court.
Nov 16 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondent.
Nov 16 2015	Joint appendix filed. (Statement of costs filed)
Nov 16 2015	Brief of petitioner Stephen Duncan, Warden filed.
Nov 19 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 23 2015	Brief amicus curiae of Washington, et al. filed.
Nov 24 2015	SET FOR ARGUMENT on Tuesday, January 12, 2016
Dec 4 2015	Record requested from U.S.C.A. 7th Circuit.
Dec 8 2015	The record from U.S.C.A. 7th Circuit is electronic and located on PACER, with the exception of one document which is electronic and SEALED.
Dec 14 2015	Record from the U.S.D.C. Northern District of Illinois is electronic.
Dec 15 2015	CIRCULATED
Dec 16 2015	Brief of respondent Lawrence Owens filed. (Distributed)
Dec 30 2015	Reply of petitioner Stephen Duncan, Warden filed. (Distributed)
Jan 12 2016	Argued. For petitioner: Carolyn E. Shapiro, Solicitor General of Illinois, Chicago, Ill. For respondent: Barry Levenstam, Chicago, Ill.
Jan 20 2016	Writ of certiorari DISMISSED as improvidently granted. Opinion per curiam.
Feb 23 2016	Judgment Issued

14-1516

No. ____

In the
Supreme Court of the United States

STEPHEN DUNCAN, Warden,
PETITIONER,

v.

LAWRENCE OWENS,
RESPONDENT.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

No clearly established precedent of this Court holds that it violates the Constitution for a finder of fact to infer a criminal defendant's motive when the motive is a non-element of the offense and is not directly established by the evidence at trial. Respondent claimed that the judge at his bench trial made improper "extrajudicial" findings regarding his motive and thus found him guilty based on evidence not produced at trial. The state appellate court upheld respondent's conviction, holding that the trial court's speculation regarding motive was harmless. The Seventh Circuit overturned respondent's conviction on habeas corpus review, finding that the trial court's inference about motive violated respondent's right to have his guilt adjudicated solely on the evidence introduced at trial, and that the error was not harmless.

Did the Seventh Circuit violate 28 U.S.C. § 2254 and a long line of this Court's decisions by awarding habeas relief in the absence of clearly established precedent from this Court?

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PETITION FOR A WRIT OF CERTIORARI

Stephen Duncan, Warden of the Lawrence Correctional Center in Sumner, Illinois, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, which, in a published opinion, reversed the district court's denial of habeas relief pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit granting habeas relief (App. 1a-10a) is reported at 781 F.3d 360. The memorandum opinions of the United States District Court for the Northern District of Illinois denying relief (App. 11a-55a (denying habeas relief on respondent's ineffective assistance of counsel claim and declining to issue a certificate of appealability (CA) on all claims) & App. 56a-90a (denying habeas relief in part, including on the claim at issue in the present application)) are unpublished but are reported at 2014 WL 539125 and 2012 WL 1416432. The order of the Supreme Court of Illinois denying leave to appeal on postconviction appeal (App. 91a) is reported at 955 N.E. 2d 477 (Table) (Ill. 2011). The unpublished opinion of the Illinois Appellate Court affirming respondent's judgment of conviction on postconviction appeal (App. 92a-95a) is unreported. The order of the Supreme Court of Illinois denying leave to appeal on direct appeal (App. 96a) is reported at 788 N.E. 2d 733 (Table) (Ill. 2003). The unpublished opinion of the Illinois Appellate Court affirming respondent's

judgment of conviction on direct appeal (App. 97a-129a) is unreported.

JURISDICTION

The court of appeals entered judgment on March 23, 2015. App. 1a-10a. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT

The Seventh Circuit's decision in this case violates both Congress's prohibition on habeas relief in the absence of clearly established precedent of this Court supporting the defendant's claim, 28 U.S.C. § 2254(d)(1), and this Court's repeated admonitions that the lower courts comply with this requirement, *see, e.g.*, *Woods v. Donald*, 135 S. Ct. 1372, 1378 (2015) (per curiam); *Glebe v. Frost*, 135 S. Ct. 429, 430-32 (2014) (per curiam); *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam); *Wright v. Van Patten*, 552 U.S. 120, 124-26 (2008) (per curiam) (reversing Seventh Circuit); *Carey v. Musladin*, 549 U.S. 70, 77 (2006); *see also Hardy v. Cross*, 132 S. Ct. 490, 495 (2011) (per curiam) (reversing Seventh Circuit and focusing on "unreasonable application" prong of § 2254(d)). The decision below should be reversed, either summarily or after briefing and argument.

1. On November 8, 2000, following a bench trial in the Circuit Court of Cook County, Illinois, respondent Lawrence Owens was convicted of first degree murder for beating Ramon Nelson to death with a baseball bat (or something similar) outside a liquor store in Markham, Illinois. App. 97a. Owens was identified by two eyewitnesses. App. 103a, 107a. Announcing its judgment, the trial court stated:

> I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who [respondent] knew he was a drug dealer. [Respondent] wanted to

> knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.

App. 110a. The court sentenced respondent to twenty-five years of imprisonment. *Id.*

2. On direct appeal, respondent argued that the above-quoted remarks established that the court made improper "extrajudicial" findings regarding respondent's motive and based its finding of guilt on evidence not introduced at trial. App. 98a. Motive is not an element of first degree murder in Illinois, *see People v. Hobbs*, 220 N.E.2d 469, 472 (Ill. 1966), and the trial evidence did not address whether respondent knew the victim or knew that he was a drug dealer. The Illinois Appellate Court affirmed respondent's conviction, holding that the trial court's inference regarding respondent's motive was harmless. App. 120a. Respondent renewed his claim in a petition for leave to appeal to the Illinois Supreme Court, which the court denied in April 2003. App. 96a.

3. In December 2008, while his state collateral challenge was pending, respondent filed a petition for habeas corpus under 28 U.S.C. § 2254, arguing, in part, that the trial court had made improper "extrajudicial" findings regarding his motive and thus based its finding of guilt on evidence not introduced at trial. App. 57a. In April 2012, the district court ordered an evidentiary hearing on an unrelated ineffective assistance of counsel claim and denied respondent's other claims. App. 88a. With regard to the "extrajudicial" findings claim, the district court

held that respondent failed to identify "any Supreme Court precedent that the Appellate Court allegedly applied in an unreasonable or contrary way." App. 76a. The district court also held that even if respondent could identify any Supreme Court precedent violated by the trial court's inference as to motive, the state appellate court's harmless error finding was a reasonable application of *Chapman v. California*, 368 U.S. 18 (1967). App. 76a-77a. Following a March 2013 evidentiary hearing, the district court denied habeas relief on respondent's ineffective assistance of counsel claim and declined to issue a CA. App. 54a. The Seventh Circuit granted a CA limited to the question of whether respondent's due process rights were violated because the trial judge relied on "extra-record facts" in determining respondent's guilt.

4. On March 23, 2015, the appellate panel issued its opinion granting respondent habeas relief under 28 U.S.C. § 2254. App. 10a. The Seventh Circuit held that the trial judge's inference about motive violated respondent's right to have his guilt adjudicated based solely on the evidence introduced at trial, and that the error was not harmless under the standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *Id.*

The Seventh Circuit stated that "only clearly established violations of a defendant's constitutional rights permit [the court] to reverse a state court decision challenged in a federal habeas corpus proceeding." App. 9a-10a. The Seventh Circuit then granted habeas relief, despite acknowledging that "we know of no case identical to this one," but stating that

"identity can't be required." 10a. Citing cases from this Court in which the fact-finder was exposed to information or influences other than properly introduced evidence of defendant's guilt, the Seventh Circuit concluded that the state trial judge's inference as to respondent's motive violated respondent's "right to have [his] guilt or innocence adjudicated on the basis of evidence introduced at trial." *Id.*

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's published decision defies AEDPA and the many decisions of this Court establishing and reaffirming that clearly established Supreme Court precedent is required to support a grant of habeas relief.

1. Habeas relief is not permitted under § 2254(d)(1) unless a state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. *See Davis v. Ayala*, 576 U.S. ___, slip. op. at 11 (2015) (state court decision holding a constitutional claim harmless constituted adjudication on the merits, and accordingly, habeas relief could not be granted unless state court's rejection of claim was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent). In discussing what law is clearly established enough to support habeas relief, this Court has repeatedly "cautioned the lower courts against 'framing [its] precedents at [] a high level of generality.'" *Smith*, 135 S. Ct. at 4 (2014) (quoting *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam)). The Seventh Circuit failed to abide by these requirements in this case.

2. None of the cases that the Seventh Circuit relied on provides the clearly established precedent of this Court that is necessary for habeas relief. More specifically, no case supports respondent's claim that because no evidence directly established the trial court's inference as to his motive, which was not an element of his crime, his rights were violated. Instead,

the cases on which the Seventh Circuit relied involved juries that were exposed to prejudicial and improper information or influences from which guilt could be inferred.

These cases are inapposite. In *Taylor v. Kentucky*, 436 U.S. 478 (1978), for example, *see* App. 10a, this Court held that the right to a fair trial was violated where the prosecution invited the jury to infer defendant's guilt from the fact that he had been arrested and indicted and where the court provided inadequate instructions regarding the State's burden of proof. 436 U.S. at 485-88. But unlike the defendant in *Taylor*, not only did respondent have a bench trial, but the State did not invite the trial judge to infer respondent's guilt from any improper basis. Indeed, respondent has never suggested that the trial judge relied on any information beyond the properly introduced trial evidence to find the elements of first degree murder.

The Seventh Circuit's reliance on *Estelle v. Williams*, 425 U.S. 501 (1976), *see* App. 10a, is similarly misplaced. *Williams* held that the right to a fair trial was violated where the defendant was compelled to appear before the jury in prison attire. 425 U.S. at 512. But again, respondent has never argued that any such prejudicial factor influenced the verdict in this case.

The final case of this Court on which the Seventh Circuit relied, *Holbrook v. Flynn*, 475 U.S. 560 (1986), *see* App. 10a, is even more inapposite. There, this Court held that the right to a fair trial was *not* violated

by the presence of additional, uniformed security personnel in the courtroom. 475 U.S. at 572. *Flynn* thus offers no support for respondent's claim.

In sum, so long as the State's evidence is sufficient to establish the elements of the crime and there is no improper influence on the fact-finder's decision-making process, no case relied on by the Seventh Circuit, and no other precedent of this Court, holds that due process is violated when the trier of fact infers a theory of the case that, while consistent with the evidence presented, also goes beyond it.

3. The Seventh Circuit pointed to two of its own decisions, *United States v. Moore*, 572 F.3d 334, 341 (7th Cir. 2009), and *United States v. Garcia*, 439 F.3d 363, 366-68 (7th Cir. 2006), as clearly establishing the legal merits of respondent's claim. App 10a. But circuit precedent cannot satisfy AEDPA's requirement of clearly established law. *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012). Nor can a circuit court derive clearly established law by "refin[ing] or sharpen[ing] a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." *Marshall v. Rodgers*, 133 S. Ct. 1446, 1451 (2013) (per curiam); *see also Smith*, 135 S. Ct. at 4 (quoting *Rodgers*). *Moore* and *Garcia* are thus irrelevant to the § 2254(d) analysis.

Even if reliance on Seventh Circuit precedent were appropriate, *Moore* and *Garcia* do not support, much less clearly establish, the legal merits of respondent's claim. In *Moore*, the court recited the general principle that "[g]uilt beyond a reasonable doubt cannot be

premised on pure conjecture," 572 F.3d at 341, while *upholding* a conviction in which the jury had to infer a variety of connections between different pieces of evidence and disregard other evidence in order to accept the government's theory of the case, *id.* at 337-41. Likewise, the *Garcia* court uncontroversially observed that the presumption of innocence means that a jury cannot be "encouraged (or allowed) to consider facts which have not been received in evidence." 439 F.3d at 367. But *Garcia* also upheld the conviction over the defendant's challenge to expert testimony that, he claimed, encouraged an inappropriate inference of his guilt. *Id.* at 368 (distinguishing *Taylor*, 436 U.S. at 484-90). Neither case supports respondent's claim.

4. Perhaps recognizing that the lack of clearly established Supreme Court precedent is an insurmountable obstacle to the grant of habeas relief, the Seventh Circuit engaged in a labored (and ultimately unsuccessful) effort to conform petitioner's claim to existing precedent by mischaracterizing the state trial judge's remarks. The Seventh Circuit wrongly construed those remarks to establish that the trial judge found the State's evidence insufficient to find respondent guilty, and that the trial judge's conclusion was based solely, or at least primarily, on the inference that respondent knew the victim was a drug dealer. App. 8a-9a. But to the contrary, the judge explicitly referred to "the State's evidence" in rendering his verdict. App. 4a-5a. That evidence, which included two eyewitnesses who identified respondent as the murderer, as well as respondent's

attempted flight when he was stopped for speeding shortly after the murder, was more than sufficient to sustain respondent's conviction, and respondent does not argue otherwise. That the trial judge inferred a motive, which is not an element of the crime, while noting that the witnesses all "skirted" that issue, does not negate the fact that he relied on "the State's evidence" to convict respondent. *Id.*

In any event, even if the Seventh Circuit's description of the trial judge's thinking were accurate, habeas relief would still be precluded because the State's evidence was sufficient to establish the elements of the crime and there was no improper influence on the trier's decision-making process. No case relied on by the Seventh Circuit and no other precedent of this Court holds otherwise, thus precluding habeas relief. *See supra* at 8-9.

5. The Seventh Circuit's grant of habeas relief in this case is impossible to reconcile with AEDPA—as well as with the decisions of this Court construing it—which emphasizes comity, finality, and federalism. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000). Given the importance of these interests, the absence of a circuit split has not deterred this Court from granting certiorari (and reversing) in numerous cases in which the federal appellate courts have ignored the dictates of § 2254 and granted habeas relief despite the absence of clearly established Supreme Court precedent. *See, e.g., Donald*, 135 S. Ct. at 1378; *Frost*, 135 S. Ct. at 430-32; *Smith*, 135 S. Ct. at 4; *Van Patten*, 552 U.S. at 124-26; *Musladin*, 549 U.S. at 77; *see also Cross*, 132 S. Ct. at 495. This Court should

summarily reverse the judgment in this case, or, in the alternative, grant this petition and set the case for full briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2015

In the

United States Court of Appeals

For the Seventh Circuit

No. 14-1419

LAWRENCE OWENS,

Petitioner-Appellant,

v.

STEPHEN DUNCAN, WARDEN,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 08 C 7159 - **Thomas M. Durkin,** *Judge.*

ARGUED MARCH 3, 2015 — DECIDED MARCH 23, 2015

Before POSNER, KANNE, and TINDER, *Circuit Judges.*

POSNER, *Circuit Judge.* Lawrence Owens was convicted of first-degree murder in November 2000 after a bench trial in the Circuit Court of Cook County. The judge sentenced him to 25 years in prison; he has almost 11 years of his sentence left to serve. His conviction and sentence were affirmed. He

then filed state claims for post-conviction relief that came to naught eight years after having been filed, when the state supreme court declined to hear an appeal from the affirmance by the intermediate appellate court of the trial court's denial of Owens' petition for such relief.

He had already filed a petition for federal habeas corpus relief, 28 U.S.C. § 2254, and, the state proceedings having finally wound up, the federal district court adjudicated the petition—and denied it, precipitating this appeal. In it he argues that the state trial judge who convicted him based his decision on evidence that did not exist, thus denying him due process of law in violation of the Fourteenth Amendment. *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) ("one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial," quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice") (citation omitted); see also *United States v. Moore*, 572 F.3d 334, 341 (7th Cir. 2009) ("Guilt beyond a reasonable doubt cannot be premised on pure conjecture"); *United States v. Garcia*, 439 F.3d 363, 366-68 (7th Cir. 2006) ("The presumption [of innocence] is violated . . when the jury is encouraged (or allowed) to consider facts which have not been received in evidence").

In 1999, in the City of Markham (current population 12,508), 20 miles south of Chicago, a

young man named Ramon Nelson, while riding his bike away from a liquor store, received a fatal blow to the head by a person, presumably male, wielding a wooden stick that may have been a baseball bat. Two eyewitnesses to the murder testified at Owens' trial. Maurice Johnnie identified Owens as the murderer from a photo array of six persons and from a lineup — although Owens was the only person in the line-up who also was in the photo array, thereby diminishing the probative value of the second identification. The other eyewitness, William Evans, identified Owens as the murderer from the same photo array and a lineup. But at the trial, though Owens was present in the courtroom, Evans twice pointed to a photo of someone else in the photo array as being Owens. There were other discrepancies between the two witnesses' testimony. Evans testified that there had been two assailants, Johnnie that there had been only one. And Evans but not Johnnie testified that Nelson had spoken with the assailants before they assaulted him

Nelson had crack cocaine on his person when he was killed that appeared to be packaged for individual sale, for the cocaine was in 40 small plastic bags in his coat. No evidence was presented that Owens had known Nelson, used or sold illegal drugs, or had any gang affiliation. If Owens had had any record of involvement in the illegal drug trade, or in gangs, the prosecution would, one imagines, have presented evidence of that involvement; it did not. Also absent was any physical evidence (such as fingerprints on the baseball bat) pointing to Owens as the murderer. Moreover, the murder had taken place at 8:30 p.m. on September 22. Sunset was at 6:47p.m. that evening, and so it would have been dark ("nautical twilight" as it is called —the hour after sunset— would have

ended by 7:47 p.m., see WeatherSpark, "Average Weather On September 22 For Chicago, Illinois, USA: Sun," https://weatherspark.com/averages/30851/9/22/Chicago-Illinois-United-States (visited March 11, 2015)) — three quarters of an hour before the murder took place. Not pitch black, though, and apparently the area in which the murder was committed had been illuminated to an undetermined extent by light from street lamps and from a nearby building.

The eyewitness identification (at least by Maurice Johnnie) could, we assume despite the substantial doubts that have been raised concerning the reliability of eyewitness evidence (see, e.g., National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* (2014); Sandra Guerra Thompson, "Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony," 4 *U.C. Davis L. R.* 1487 (2008); Nancy Steblay et al., "Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison," 27 *Law and Human Behavior* 523 (2003); Gary L. Wells et al., "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," 22 *Law and Human Behavior* 603 (1998)), have supported a finding beyond a reasonable doubt that Owens had murdered Nelson. But it is highly uncertain whether the judge (for remember that Owens' trial was a bench trial, not a jury trial) thought that *any* of the evidence that had been presented sufficed to dispel reasonable doubt of Owens' guilt. For at the end of the parties' closing arguments the judge said: "I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug

dealer [Nelson], who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder." That was *all* the judge said in explanation of his verdict, and it was nonsense. No evidence had been presented that Owens knew that Nelson was a drug dealer or that he wanted to kill him (we assume that by "knock him off" the judge meant "kill him"), or even knew him— a kid on a bike. The prosecutor had said in his closing argument that the case "boils down to identification ..., how they identified him and where ... and *in* this case identification equals recognition." The judge seems not to have been convinced, for he said nothing to suggest that *he* thought the real issue *in* the case was identification. If one may judge from what he said, which is the only evidence of what he thought, he thought that Owens' knowledge that Nelson was a drug dealer was *the* fact that dispelled reasonable doubt of Owens' guilt. Otherwise, why would he have called the existence of this fact the "real issue" in the case—the basis therefore of the verdict?

Even if the proper way to determine whether the judge would have convicted Owens had he not mistakenly believed that Owens knew Nelson and knew him to be a drug dealer (and wanted to kill him for that reason) would be to ask the judge what he was thinking when he sentenced Owens almost 14 years ago, that approach would be impossible. The judge died two years ago. *Chicago Tribune Obituaries,* "Joseph M. Macellaio," April 3, 2013, www.legacy.com/obituaries/chicagotribune/obituary.aspx?pid=164012815 (visited March 11, 2015).

On Owens' appeal from his conviction, the state appellate court ruled that the trial judge's belief that Owens knew Nelson to be, or was himself, involved with drugs or gangs was baseless, saying "there was no evidence presented that defendant knew Nelson was dealing drugs, and there was no evidence presented that defendant was involved with gangs or the illegal drug trade." The court also said that "the reliability of Evans' testimony is severely called into question," noting not only Evans' two failures to identify Owens in the photo array in the courtroom but also his having been promised by the prosecution probation on two drug charges in exchange for his testimony. Nevertheless the court ruled 2-1 that the trial judge's error had been harmless because Johnnie's eyewitness identification of Owens was sufficient to establish Owens' guilt. The federal district court, in denying Owens' petition for habeas corpus, added nothing to the state courts' discussion of the harmless-error issue.

The dissenting judge in the state appellate court pointed out that the trial judge had "never stated that he relied on that identification or other properly admitted evidence," so that "what we do have is a trial judge manufacturing, supplying, and interjecting its own evidence into a trial and then affirmatively stating on the record that this manufactured evidence constituted the basis of its verdict." She added that the error was not harmless because the trial judge had "only considered unsupported insinuations without any indication that he was aware of this impropriety." The trial judge hadn't actually *said* that he'd considered only evidence not in the trial record, but the only ground for his finding Owens guilty that he mentioned had no basis in that record (or

elsewhere for that matter).

Not every fact on which a verdict is based must be found in or inferred from evidence introduced by a party. There is judicial notice (for example of what time nautical twilight begins and ends on a given day of the year); there are legislative facts; there are stipulated facts. But there was no factual basis of any sort, in the trial record or elsewhere, for the judge's finding that Owens knew Nelson, let alone knew or cared that he was a drug dealer. The judge made it up.

In its brief in our court the state argues that the judge's determination that Owens knew Nelson and knew him to be a drug dealer, etc. was a reasonable inference from Owens' having killed him. The argument is that the judge, having (without bothering to say so) concluded that Owens had killed Nelson, was merely remarking that it was a drug-related crime. And indeed it is highly plausible that Nelson was murdered by someone in the drug business. But the critical issue in the case was whether *Owens* had murdered Nelson. The murderer's motive could not have been "the real issue" in the case — as the state keeps stressing, motive is not an element of the crime of murder or of the prosecution's case and was not addressed by Owens' trial counsel either, and the prosecution had made no effort to prove that Owens had known Nelson or was himself in the drug business. If as the judge thought and is plausible in light of what was found on Nelson's person the murderer was a drug dealer, there's a good chance Owens was not the murderer.

The state mistakenly characterizes Owens as contending that "inferring a defendant's motive

entitles petitioner to a new trial if that inference is not fully supported by the evidence at trial." Had the judge said that he'd found the defendant guilty beyond a reasonable doubt on the basis of the evidence presented at the trial, and merely added that "by the way my guess is that Owens knew Nelson and killed him for reasons related to their both being drug dealers," Owens would have no case, because the judge's observation would not have been the basis of Owens' conviction. In fact the evidence of Owens' guilt was as we've seen far from conclusive, yet its uncertainty did not engage the judge's attention. The judge appears to have been thoroughly confused — and likewise the state when it argues in its brief in our court that the judge's inference that Owens killed Nelson for drug-related reasons "was arguably a reasonable inference from the" fact that "Nelson had forty bags of crack cocaine on him at the time of the attack." Nelson's being a drug dealer could not by itself have supported any such inference about the identity of his murderer unless more had been known about the murderer than the prosecution was able to establish.

Nonetheless, to repeat, we can assume that if the evidence of Owens' guilt had been overwhelming, the judge's conjecture that Owens knew Nelson and knew him to be a drug dealer and that Owens was (as the judge's comment implied) himself involved in the drug trade (why else would he want to kill Nelson?) could be disregarded as goofy but harmless. But evidence of Owens' guilt was not overwhelming. Had it been, it is unlikely that the judge would have described Owens' supposed (but by only the judge) knowledge of Nelson's involvement in the drug business as "the real issue" in the case. What may

have made it the "real issue" to the judge was the scantiness of the actual evidence of Owens' guilt.

It remains to consider whether the judge's blunder satisfies the test for whether a state court's error, though of constitutional magnitude (in this case, because the judge based a verdict of guilty on ungrounded conjecture), can escape being deemed "harmless" when challenged in a federal habeas corpus proceeding. The test "is whether the error had substantial and injurious effect or influence in determining the jury's verdict. Under this standard, habeas [corpus] petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas [corpus] relief based on trial error unless they can establish that it resulted in actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citations and internal quotation marks omitted). Owens has satisfied this standard. Given that the entire case pivoted on two shaky eyewitness identifications, Owens might well have been acquitted had the judge not mistakenly believed that Owens had known Nelson to be a drug dealer and killed him because of it. As we explained in *Jones v. Basinger*, 635 F.3d 1030, 1053-54 (7th Cir. 2011), the question that *Brecht* requires us to answer is not whether a reasonable trier of fact could have rendered the verdict that it (in this case he) did, but whether the trier of fact committed an error that had a substantial malign influence on the verdict. The trial judge's singling out as the only explanation for the verdict a "fact" having no evidentiary support, and declaring it the "real issue" in resolving the case, had to have had such an influence.

We are mindful that only clearly established

violations of a defendant's constitutional rights permit us to reverse a state court decision challenged in a federal habeas corpus proceeding. *Nevada v. Jackson*, 133 S. Ct. 1990 (2013). But there's no question that the right to have one's guilt or innocence adjudicated on the basis of evidence introduced at trial satisfies that exacting standard. That is clear from the Supreme Court decisions in *Holbrook*, *Taylor*, and *Estelle*, and our own *Garcia* and *Moore* decisions, from all of which we quoted earlier. It's true that we know of no case identical to this one—unsurprisingly, given the combination of weak proof with a verdict based on groundless conjecture. But identity can't be required. The Supreme Court has made clear in the cases we've cited and quoted from that a judge or a jury may not convict a person on the basis of a belief that has no evidentiary basis whatsoever. Just imagine that the judge in our case had said "I know there's no evidence of guilt, but I also know that prosecutors in the City of Markham *never* prosecute an innocent person." The defendant would be entitled to relief *in* a habeas corpus proceeding even though that precise statement had never been uttered by a judge before.

And so we reverse the judgment denying Owens relief and give the state 120 days in which to decide whether to retry him. If it does not decide within that period to retry him, he must be released from prison.

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United States District Court, N.D. Illinois, Eastern Division.

Lawrence Owens, Petitioner,
v.
Marc Hodge, Warden, Lawrence Correctional Center, Respondent.

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MEMORANDUM OPINION AND ORDER

Thomas M. Durkin, United States District Judge

*1 Petitioner Lawrence Owens, an Illinois state prisoner serving a 25—year prison term for the first degree murder of Ramon Nelson, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Owens's petition, filed in December 2008, raised five claims that he alleged warranted habeas relief: (1) his due process rights were violated by the state court's delay in resolving his claims for state postconviction relief ("Claim 1"); (2) there was no probable cause to arrest him ("Claim 2"); (3) the trial court admitted a photo

array and lineup identification that were both improperly suggestive ("Claim 3"); the trial court made improper "extrajudicial" findings regarding Owens's motive to commit murder and based its findings of guilt on evidence not produced at trial ("Claim 4"); and (5) trial counsel was ineffective for failing to investigate and call alibi witnesses and for misleading Owens regarding his right to testify ("Claim 5"). R. 1.

On May 29, 2012, the Court found Claim 1 to be non-cognizable; Claims 2 and 3 to be procedurally defaulted; and Claim 4 to lack merit. *Owens v. Acevedo,* No. 08 C 7159, 2012 WL 1416432, at *7-9 (N.D.Ill. May 29, 2012) (Pallmeyer, J.). The Court also ordered an evidentiary hearing on the ineffective assistance claim presented in Claim 5 and reserved ruling on whether a certificate of appealability should issue. *Id. at *15.* [1] On March 18 and 19, 2013, the Court conducted an evidentiary hearing. R. 125, 126. The parties completed their post-hearing briefing on January 9, 2014.

Based on the testimony and documentary evidence presented at the evidentiary hearing, and the credibility determinations the Court makes regarding the witnesses who testified, Owens's habeas petition is denied. The Court further declines to certify any issues for appeal.

Background

A. Trial Evidence

Owens was convicted at a bench trial. The evidence introduced at trial was recounted by the state appellate court in its order affirming Owens's

conviction on direct appeal, R. 152-1 at 136-49, and in the Court's prior opinion, *Owens*, 2012 WL 1416432, at *1-4 (Pallmeyer, J.). Absent clear and convincing evidence to the contrary, which Owens has not presented, these facts are presumed correct for purposes of federal habeas review. *See* 28 U.S.C. § 2254(e)(1); *Morgan v. Hardy*, 662 F.3d 790, 797 (7th Cir.2011).

On September 22, 1999, at approximately 8:30 p.m., 17—year—old Ramon Nelson was beaten with a baseball bat outside a liquor store and lounge in Markham, Illinois. Nelson died as a result of this beating. Before the beating occurred, Maurice Johnnie was sitting in the passenger seat of his car with two friends; his friend Johnny Morgan was sitting in the driver's seat, and Morgan's friend was sitting in the backseat. The three were parked about ten feet from the entrance to the liquor store and were facing the direction of the store's front doors. The sun had gone down, but it was not quite dark yet, and the area in front of the store was illuminated by street lights and lights from the liquor store's front doors

*2 At one point, Morgan's friend exited the car and entered the liquor store. While Johnnie and Morgan waited in the car for him to return, Nelson pulled alongside the parked vehicle on a bicycle and began speaking with Morgan Johnnie did not know Nelson. After Nelson and Morgan spoke for about three to five minutes, Nelson rode his bicycle past the front of the car, down the sidewalk, towards the entrance of the liquor store. Johnnie then saw a man, later identified as Owens, walking down the sidewalk in the opposite direction and toward Nelson. Nelson attempted to

turn his bicycle around, but Owens caught up with him and struck him on the head with a baseball bat. Nelson fell from his bicycle into the doorway of the store, and as he lay on the ground, Owens forcefully struck him in the head a second time with both hands on the bat. After Owens had hit Nelson a second time, he turned and walked back in the direction from which he had come. Johnnie and Morgan exited their vehicle and went to aid Nelson, who was unconscious and groaning. Morgan insisted they take Nelson to the hospital where Nelson died the next day as a result of multiple skull fractures.

That night, William Evans was also on the same block as the liquor store. About a half hour before the attack, Evans had spoken to Nelson, whom he knew from the neighborhood. After talking with Nelson, he observed Nelson ride his bicycle toward the store's front entrance. At the time of the attack, Evans was retrieving a bucket at the northeast corner of the block to wash a car when he then heard a "wood splitting" sound. Evans looked back in the direction of the sound and saw Owens, who he did not know but recognized as someone who had previously been in the liquor store. Evans saw Owens strike Nelson twice on the head with a baseball bat. When Evans cried out, "hey, what is going on," Owens and another individual ran off past him Evans went to aid Nelson and helped Johnnie and Morgan put Nelson into Johnnie's car. Immediately after the attack, Evans spoke with police, described the approximate height and weight of the two individuals he saw, and informed them that he recognized Owens from the neighborhood.

At trial, Evans revealed that he had a prior drug conviction for which he was on probation, and was in custody on another drug charge. He also acknowledged that he was testifying in exchange for State recommendations of probation on that pending drug charge and a recommitment of probation on the previous drug offense.

Johnnie did not speak with police officers that night, and when he dropped Nelson off at the hospital, he provided a false name and address. Responding officers to the crime scene, however, obtained the license plate number of the vehicle that transported Nelson to the hospital, and Detective Terry White was able to identify Johnnie from the vehicle's registration. About a week after the incident, on September 28, 1999, Johnnie was interviewed at the Markham police station where he described Nelson's attacker as a large black male, approximately 6'2' to 6'4', weighing 220 to 240 pounds and dressed in brown clothing. Based on Johnnie's description, Detective White compiled a photo array of six men. From the photo array, Johnnie selected Owens's photo as the individual who attacked Nelson. Detective White stated at trial that at no time while Johnnie viewed the array did he ever suggest that the attacker was in the array or make any other suggestive remark. That same day, Evans viewed the photo array at the police station. He also described Nelson's attacker as a large black male, dressed in brown or tan clothing. Detective White testified that Evans identified Owens from the photo array as Nelson's attacker.

Following the photo identifications, the police were on the lookout for Owens in connection with Nelson's

murder. [2] On October 26, 1999, Officer Mike Alexander observed a speeding vehicle. Officer Alexander activated his emergency lights and siren, and instead of stopping, the vehicle accelerated through a stop sign and proceeded down the road with Alexander in pursuit. When the vehicle finally pulled over, Owens exited the vehicle and ran. Alexander gave chase and apprehended Owens a block and a half later. At his motion to quash his arrest, Owen claimed that he did not see Alexander's squad car until 30 seconds before he pulled over and that he walked, not ran, upon exiting his vehicle.

*3 A day after Owens's arrest, Detective White arranged a five-man lineup for Johnnie and Evans to view. Each independently selected Owens from that lineup as Nelson's attacker. At trial, Detective White acknowledged that Owens was the only individual who appeared in both the photo array and lineup viewed by Johnnie and Evans Johnnie testified that of the five individuals in the lineup, Owens was the "biggest and bulkiest" but that he did not select Owens out of the lineup based on height because everyone in the lineup was seated. When asked to view a photograph of the lineup at trial, Evans identified Owens as the man he had identified to Detective White the night he viewed the lineup, though earlier in his testimony, Evans had twice failed to identify the photo of Owens in the array he had selected at the police station.

The parties stipulated at trial that 40 bags of crack cocaine were found in Nelson's coat pocket. The defense rested without presenting any evidence. After hearing closing arguments, the state trial court

convicted Owens of the first degree murder of Nelson, and then sentenced him to 25 years of imprisonment.

B. Postconviction Affidavits

After an unsuccessful round of direct appellate review of his conviction, Owens pursued further relief in state court by filing a postconviction petition.[3] Owens filed his first petition *pro se* on September 10, 2003, and then through appointed counsel filed an amended petition on June 16, 2008 and an amended supplemental petition on November 7, 2008, claiming that trial counsel was ineffective for failing to interview and call alibi witnesses and for failing to allow Owens to testify at trial; Owens also raised an actual innocence claim. R. 152-2 at 24-111, 112-35.[4] In support of his ineffective assistance claim, Owens presented two sets of affidavits that each included affidavits from Owens, Timothy Blackman, Sheila Minor, and Owens's mother, Bertha Marie Owens. All the documents in the first set were dated in the summer months of 2003 and were filed with the state court on September 11, 2003; all the documents in the second set were signed on dates ranging from 2006 to 2009.

Owens asserted in his August 26, 2003 affidavit that he was actually innocent of Nelson's murder and that he repeatedly informed his attorney, Frank Rago of that fact. R. 152-2 at 55-56. According to Owens, he told Rago that he had an alibi for the night Nelson was murdered and that he had two witnesses who could corroborate that alibi—Blackman and Minor. *Id.* at 55. Owens further averred that Rago told him and his mother that he would investigate Owens's alibi witnesses and that he would "allow" Owens to

testify in his own defense. *Id.* at 56. But, Owens says, Rago failed to investigate or interview his alibi witnesses and "forb[ade] [Owens] to testify *[sic]* in [his] own defense." *Id.* Owens added in his January 11, 2008 affidavit that "[a]lthough [he] felt [he] needed to testify at trial ... Rago told [him] not to worry, meaning that [Owens] would be acquitted." *Id.* at 98. Owens claimed that neither Rago nor the trial judge explained that he had a right to testify at trial and that the decision regarding whether to testify was his. *Id.* And had he known it was his decision to testify, Owens adds, he would have testified that he did not murder Nelson and was with Minor and Blackman at the time. *Id.*

In his July 18, 2003 affidavit, Blackman details the time he and Owens spent together on September 22 and 23 in 1999. Blackman avers that at 2:30 p.m., he and Owens were standing in front of Owens's house when their mutual friend, Sheila Minor, drove by and asked them to help her assemble a new dinette set. *Id.* at 57 At about 6:15 p.m., Owens and Blackman met Minor at her father's home, and from there they drove to Minor's house where they arrived around 7:20 p.m. *Id.* At her house, Owens and Blackman assembled the dinette set and then spent the rest of the evening talking, eating, and watching television. *Id.* Around 10 p.m., Minor offered to drive Owens and Blackman home but also offered to let them spend the night and drive them home the following morning. *Id.* Owens and Blackman spent the night at Minor's home—they never left her home after they arrived — and Minor drove them home around 6 a.m. the next morning. *Id.* Blackman states in his affidavit that prior to trial, he spoke with Owens's mother and told her that he would testify to these events. *Id.* Owens's

mother told Blackman that Owens's attorney would contact him, but Blackman averred that Rago never called, interviewed, or asked him to testify for Owens. *Id.*

*4 Blackman's second affidavit, dated August 23, 2009, provides a fairly similar account, adding that Blackman and Owens met while they were high school students and that the two had known each other for 18 years. R. 152-2 at 101. According to Blackman, in September 1999, he and Owens saw each other three or four times a week, and on September 21, 1999, Owens and Blackman celebrated a friend's (Manny) birthday together. *Id.* Slightly different from his earlier affidavit, Blackman stated in his 2009 affidavit that on September 22, 1999, he and Owens met at Blackman's house—not Owens's house—and that they returned home from Minor's house the next day at 8 a.m.—not 6 a.m. *Id.* at 101-02. Blackman concludes his affidavit by saying that although the events described in the affidavit were from many years earlier, he was "certain of the dates," because he recalled celebrating Manny's birthday. *Id.* at 103.

Minor's affidavits recounted the night she spent with Owens and Blackman in a similar fashion. R. 152-2 at 58, 104-05. According to Minor, she was with Owens and Blackman at her house from 7:20 p.m. on September 22, 1999 to about 6 a.m. on September 23, 1999. *Id.* at 58, 104. Minor stated that Owens's attorney, Rago, never called, interviewed, or asked her to testify, though she would have been willing to do so. *Id.*

Bertha Marie Owens provided two affidavits, which discussed her involvement in Owens's defense. *Id.* at 59-60, 106-07. In her affidavits, she states that on several occasions, she informed Rago that Blackman, Minor, and Owens wanted to testify about Owens's alibi defense, and she provided Rago with Blackman's and Minor's names and contact information. *Id.* at 59-60, 106. Yet Rago never interviewed them or investigated the alibi defense, despite assurances to Ms. Owens that he would. *Id.* Ms. Owens claimed that Rago decided not to use the alibi defense or allow Owens to testify because the case against Owens was "so weak ... that he would never get convicted." *Id.* at 60; *see also id.* at 106

C. Procedural History

While his state postconviction proceeding was pending, Owens initiated this § 2254 proceeding on December 15, 2008. R. 1. The Warden moved to dismiss Owens's § 2254 petition based on Owens's failure to exhaust his available state court remedies. R. 18. Owens responded, citing the inordinate delay by the state courts in resolving his postconviction petition, which, at that point, had been pending for more than five years. R. 21. The Court appointed counsel to investigate the status of Owens's long-pending postconviction petition and to assist Owens with responding to the Warden's motion to dismiss. R. 57. On March 9, 2010, the Court denied the Warden's motion to dismiss, noting that while some of the delay was attributable to the conduct of his appointed attorneys, Owens had demonstrated that a ruling on his postconviction petition was delayed for reasons outside of Owens's control and that Owens had been diligent in urging action on that petition. R. 24. The

Court then ordered the Warden to answer the § 2254 petition, *id.*, which the Warden did, R. 41.

Meanwhile, Owens's postconviction petition made its way through the state courts. In his postconviction appeal, Owens argued that trial counsel was ineffective for failing to call Minor and Blackman to testify at trial and that he was deprived of his constitutional right to testify on his own behalf. R. 77 at 115-16. The state appellate court denied Owens's postconviction appeal on March 21, 2011, *id.* at 118-19, and Owens's round of postconviction review concluded when the Illinois Supreme Court denied Owens's petition for leave to appeal, raising the same claims raised in his postconviction appeal, on September 28, 2011, R. 77 at 151.

On May 29, 2012, the Court resolved a number of the claims raised in Owens's § 2254 petition, finding Claim 1 to be non-cognizable, Claims 2 and 3 to be procedurally defaulted, and Claim 4 to lack merit. *Owens,* 2012 WL 1416432, at *7-9 (Pallmeyer, J.). As to Claim 5, the Court found that the ineffective assistance allegations in Claim 5 were not procedurally defaulted and determined that an evidentiary hearing was necessary to ascertain (1) whether trial counsel failed to investigate Owens's alibi defense, interview his alibi witnesses, or call his alibi witnesses to testify on Owens's behalf; and (2) whether, and to what extent, Owens understood his right to testify. *Id.* at *10-14; *see also* R. 78.

*5 The evidence offered at the evidentiary hearing conducted on March 18-19, 2013 included live testimony from Owens, Timothy Blackman, Owens's trial counsel Frank Rago, and Noel Zupancic, an

investigator with the Cook County Public Defender's Office. The evidence also included the postconviction affidavits offered by Owens, Blackman, Minor, and Bertha Marie Owens [5] in support of Owens's ineffective assistance claim and other documentary evidence relating to Rago and Zupancic's investigation into Owens's alibi defense.

Analysis

Owens is entitled to habeas relief if he is being held under a state court judgment obtained in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). Owens alleges habeas relief is warranted because his trial counsel was ineffective for two reasons: (1) counsel failed to investigate his alibi defense and relatedly, failed to call alibi witnesses to support that defense; and (2) counsel misled Owens regarding his right to testify at trial.

To prevail on a claim of ineffective assistance under *Strickland v. Washington,* Owens must demonstrate that (1) his trial counsel rendered deficient performance, meaning his representation fell below an objective standard of reasonableness; and (2) but for counsel's unprofessional errors or omissions, there is a reasonable probability the result of the trial would have been different. 466 U.S. 668,694 (1984); *see also Brady v. Pfister,* 711 F.3d 818,823 (7th Cir.2013).

I. Counsel's Failure to Investigate Owens's Alibi Defense and Call Timothy Blackman and Sheila Minor as Alibi Witnesses

A. Factual Background

At the evidentiary hearing, Owens testified that he could not have committed the murder of Ramon Nelson on September 22, 1999 because he was with Timothy Blackman and Sheila Minor at Minor's house at the time the murder took place. R. 126 at 70-77.[6] According to Owens, on the afternoon of September 22,1999, he saw his friend Tasha (last name then unknown) at 3 p.m.; he then saw his friends Karee Williams, Jamil, Greg, Kenworth, and Will (last names unknown) around 5 p.m. at Tasha's house. *Id.* at 129-32. After Owens left Tasha's house around 5:30 p.m., he then spent the remainder of the evening with Blackman and Minor at Minor's house assembling her furniture. *Id.* at 70-77. Owens claimed that he was with them from 6 p.m. on September 22, 1999 until 6 a.m. the following morning when Minor drove him and Blackman home. *Id.* He, Blackman, and Minor were childhood friends, and during that time period, they saw each other regularly. *Id.* at 124,126,156-58. Indeed, Minor was one of Owens's best friends, and after Owens's arrest and conviction, Minor visited Owens numerous times at the Cook County Jail and the Illinois Department of Corrections. *Id.* at 159-60.

Owens testified that after he was arrested, he told police that he had an alibi for the night of the murder, and when he met his attorneys, Rago included, he also told them about that defense. *Id.* at 78-85; *see also* R. 140-2 at 2. Owens said that he gave Rago several

names of individuals who could corroborate his whereabouts that night—Blackman, Minor, Karee Williams, and Jamil, Will, Kenworth, and Tasha [7] — and followed up later with Rago regarding these individuals, further giving Rago the addresses of Blackman, Tasha, and Minor's father (Owens did not know Sheila Minor's address). R. 126 at 85-88,99-100,216— 17. According to Owens, Rago told Owens that he had tried to locate Blackman, but Rago never told Owens that Blackman had said when Rago found him that he did not recall being with Owens on the night of the murder. *Id.* at 199-201. Owens added that he believed that he tried to contact Blackman to tell him to reach out to Rago, and he told Minor to talk to Rago when she visited him at the Cook County jail. *Id.* at 218. Owens further stated that when he asked Rago about the status of his alibi witnesses, Rago told Owens that he "didn't like" those witnesses, an explanation that Owens accepted. *Id. at* 110-11,119.

*6 Owens testified that after he was charged with murder but before his trial, he sent Rago a letter where he told Rago that he could not have committed the murder because he was not at the scene at the time. *Id.* at 135-37; *see also* Resp. Exh. 20, Letter from Owens to Rago dated February 19, 2000. Owens acknowledged that the letter did not mention that he was with Blackman, Minor, Tasha Dugar, or any of his other friends at the time of the murder. R. 126 at 138-40. After he was convicted, Owens sent Rago several more letters. *Id.* at 141-46; *see also R.* 140-3 at 4-10. Nowhere in those letters, where Owens sets forth several bases for a motion for a new trial, did Owens mention Tasha, Karee, Jamil, Greg, or Kenworth; nor did he say that he was with Blackman and Minor on the night of the murder, or challenge

Rago's failure to investigate Owens's alibi defense. R. 126 at 146-52; *see also* R. 140-3 at 4-10. Indeed, nowhere in these letters did Owens indicate he was dissatisfied with Rago's representation of him. *Id.*

Rago testified that he became a licensed attorney in 1975. R. 125 at 31, 92. After he was licensed, Rago worked as an assistant public defender. *Id.* at 93. Around 1982 to 1983, he became a felony trial assistant at the Markham County courthouse where he worked until 2002. *Id.* at 94. During that time, the Public Defender's Office employed a system with four classification levels of attorneys. *Id.* at 31-32, 95. Attorneys classified as Level I attorneys were assigned to misdemeanor or traffic-level cases; Level II attorneys handled more serious misdemeanor cases; Level III attorneys were felony trial attorneys; and attorneys classified as Level IV attorneys were qualified to handle death-penalty cases. *Id.* at 31-32, 95. Rago was a Level IV attorney. *Id.* During Rago's almost 20—year career with the Public Defender's Office, Rago handled over 300 murder cases, 10 to 15% of which were trials, resulting in about 30 to 45 murder trials over the course of his career. *Id.* at 32-34, 97-98.

Rago testified that he began representing Owens sometime after Owens's October 1999 preliminary hearing. *Id.* at 100-01. Rago lacked specific recollection regarding much of his representation of Owens and of his investigation into Owens's case, and much of his testimony regarding his representation of Owens was based on his general practice at the time. *See Williams v. Lemmon,* 557 F.3d 534,540 (7th Cir.2009) (allowing for conclusion that a lawyer acted in accord with his normal practice). Rago testified

that after assignment to Owens's case, he would have reviewed the report generated by the Assistant Public Defender assigned to represent Owens at his preliminary hearing. R. 125 at 99-103. That report revealed that Owens was asserting a potential alibi defense, namely that on the night of the murder, he was drinking with friends. *Id.* at 70-71, 100-103; *see also* R. 140-2 at 2.

During the course of his representation of Owens, Rago made several requests to his investigator Noel Zupancic for the purpose of Owens's defense. Zupancic began working as an investigator at the Public Defender's Office in 1994. R. 126 at 6. Similar to the classification levels of attorneys, the Public Defender's Office employed several levels of investigators. According to Zupancic, an Investigator I served subpoenas, transported witnesses, and accompanied other investigators on their investigations whereas an Investigator II, which was what Zupancic was at the time of the Owens investigation, conducted witness interviews. *Id.* at 7, 43. An Investigator with a Level III classification handled more complex cases and could serve as a lead investigator in a case. *Id.* at 7. Around 2001, Zupancic became an Investigator III. *Id.* at 7-8.

Rago's first investigative request to Zupancic occurred around July 3, 2000. In that request, Rago asked Zupancic to accompany him to the crime scene—to observe the locale, its lighting conditions, and the positions of the surrounding buildings for the purpose of matching these details against the information in the police reports. R. 125 at 36-39, 76-78, 123-26; R. 126 at 9; *see also* R. 140-2 at 18. Rago made another investigative request to Zupancic around September

12, 2000 to locate potential alibi witnesses, Timothy Blackman and "Tasha" (last name then unknown), names Rago presumed he acquired from Owens, the individual, he said, who was best in the position to provide Rago with this information. R. 125 at 40-41; R. 126 at 15, 35; *see also* 140-2 at 20. Based on his general practice at the time, Rago testified that as soon as he learned that Blackman and Tasha could be potential alibi witnesses, he would have acted immediately on that information because delayed action on those leads could prove detrimental to Owens's case. R. 125 at 127. Based on that general practice, Rago believed that since the investigative report indicated that he requested an investigation into Blackman and Tasha around September 2000, Owens must have given him the names of these witnesses around that time. *Id.* at 126-27. During Rago's conversations with Owens regarding his defense, Owens never mentioned Sheila Minor as a potential alibi witness to Rago. *Id.* at 60, 128. If Owens had done so, Rago said, he would have tried to locate her, like he did with Blackman and Tasha. *Id.* at 128.

*7 During her investigation into Owens's alibi defense, around early November 2000, Zupancic tracked down an individual who she believed to be Blackman. *Id.* at 82-83, 134; R. 126 at 25-28; *see also* R. 140-2 at 21. Zupancic spoke with this individual, who identified himself as Blackman on the phone, and he told Zupancic that he "c[ould] not remember anything specific about the night of September 22nd, 1999" and that he "really c[ould] not say that he was with [Owens]" that night. R. 125 at 85, 134; R. 126 at 27-30, 51; *see also* R. 140-2 at 21-23. Blackman, however, told Zupancic that he regularly saw Owens

during that time period. R. 125 at 85; R. 126 at 30. After this conversation, Zupancic and Blackman made further plans for an in-person interview, but Blackman failed to appear at the arranged time and place, and did not return subsequent phone calls from Zupancic. R. 125 at 86, 134-36; R. 126 at 30-34, 52-53.

Pursuant to Rago's September 2000 investigative request, Zupancic also attempted to track down Tasha. R. 125 at 88-89, 136; R. 126 at 17, 19; *see also* *R.* 140-2 at 24-25. Around October 4, 2000, after going to the location she had for Tasha, Zupancic spoke with a man who she believed was Tasha's brother and obtained Tasha's last name (Dugar) and phone number. R. 126 at 17; *see also* R. 140-2 at 24. Zupancic later returned to that address on October 10, 2000, and encountered a woman outside the home who refused to identify herself. R. 125 at 89, 137; R. 126 at 18; *see also* R. 140-2 at 24. The woman told her that Tasha did not live at that address and that she did not know Tasha's current address. R. 125 at 90, 137; R. 126 at 17-18, 20— 21; *see also R.* 140-2 at 24-25. Through further investigation, Zupancic learned that Tasha had a warrant out for her arrest. R. 125 at 90, 138; *see also* R. 140-2 at 24-25. Zupancic testified that she believed that the woman she met outside the house was likely Tasha. R. 126 at 22.

According to Rago, this was the extent of what his investigation revealed regarding Owens's potential alibi witnesses: a witness who he characterized as providing a less than definitive alibi and proved difficult to locate, and a witness who they could not locate at all. R. 125 at 139. Indeed, when asked why he did not present an alibi defense, Rago provided several strategic reasons: (1) Blackman did not assist

Owens with an alibi defense based on the information Rago received from Zupancic regarding her phone interview with him; (2) Zupancic could not locate Tasha; and (3) Rago had received no other information from Owens on which to base an alibi defense or any names for any other potential alibi witnesses. *Id.* at 51-52. Based on the information available to him at the time, Rago decided that his trial strategy for Owens's case was not to present an alibi defense but instead to attack the credibility of the two eyewitnesses who were going to testify that they saw Owens commit the murder. *Id.* at 149.

Timothy Blackman testified that he and Owens were childhood friends. *Id.* at 205. Around the time of the murder, they saw each other fairly regularly at either Blackman's mother's house or Tasha's house where they would drink and play cards. *Id.* at 205, 208-10. Blackman began his testimony by stating that he remembered being with Owens on September 21, 1999 at his friend Manny Jones's birthday party. *Id.* at 206-07. He also remembered assembling a table with Owens and Sheila Minor at Minor's house one evening and staying overnight there. *Id.* at 213-20. According to Blackman, he and Owens arrived at Minor's home around 7 p.m. and returned back to their homes the next morning around 7 a.m. *Id.* at 218-19, 221. Blackman said that he learned that Owens had been charged with murder when he heard other people in the neighborhood talking about it and he read about it in the newspaper. *Id.* at 225. But he never reached out to tell anyone—police, Owens, or Owens's counsel —that he may have been with Owens on the night of the murder because ultimately he was not certain of the day that he was actually with Owens. *Id.*

*8 On cross-examination, Blackman began by testifying that he believed that he was with Owens on September 22, 1999. *Id.* at 233. But he then admitted that he really did not remember which night he went to Sheila Minor's house. *Id.* at 236-37. He remembered celebrating Manny's birthday with Owens on September 21st, but he ultimately could not even recall what year that occurred. *Id.* at 237-38. Later during cross-examination, Blackman again stated that he thought he partied with Owens on September 21st and assembled the table with Owens and Minor on September 22nd. *Id.* at 268. But he then stated again that he was not sure that he went to Minor's house on September 22nd. *Id.* at 268-69.

B. Court's Findings

The Court has carefully considered all of the documentary evidence presented at the evidentiary hearing and has considered the credibility of the witnesses who testified and the reasonableness of their testimony in light of other evidence. After considering all of this evidence, the Court finds the testimony of Rago, Zupancic, and Blackman credible, the testimony of Owens not credible, and the affidavits presented by Minor and Owens's mother suspect.

C. Deficient Performance

Where, as here, the Court reviews counsel's performance *de novo, see* 28 U.S.C. § 2243, the standard for judging counsel's representation remains a "most deferential *one*," *Harrington v. Richter,* 131 S.Ct. 770, 788 (2011). The question under *Strickland*

is "whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.* (quoting *Strickland*, 466 U.S. at 690). In reviewing counsel's performance, "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

1. Failure to investigate Tasha Dugar and other non-alibi witnesses

At the outset, the Court addresses Owens's claim that Rago was ineffective for failing to investigate a number of potential alibi witnesses, including Tasha Dugar and Owens's friends, Karee Williams, Jamil, Greg, Kenworth, and Will. R. 140 at 102-04. According to Owens, Zupancic's efforts to investigate Tasha as a witness were minimal and her attempts to find Tasha ended far too soon. *Id.* The Warden argues that this aspect of Owens's ineffective assistance claim is procedurally defaulted because it was not raised in one complete round of state court review. R. 150 at 10. Owens failed to respond to this argument.

In his postconviction proceedings, Owens alleged solely that Rago was ineffective for failing to investigate and call Minor and Blackman as alibi

witnesses. R. 152-2 at 43-48. He did not mention counsel's omission regarding any other alibi witnesses. *Id.* It is well-established that failure to allege a specific factual basis for an ineffective assistance claim in one complete round of state court review results in that particular factual basis being procedurally defaulted on federal habeas review. *See, e.g., Pole v. Randolph*, 570 F.3d 922, 934-35 (7th Cir.2009) ("[I]f a petitioner fails to assert in the state courts a particular factual basis for the claim of ineffective assistance [in one complete round], that particular factual basis may be considered procedurally defaulted."); *Stevens v. McBride*, 489 F.3d 883, 894 (7th Cir.2007) ("[T]he failure to alert the state court to a complaint about one aspect of counsel's assistance will lead to procedural default."). Until this proceeding, Owens never asserted counsel's failure to investigate Tasha and Owens's other potential alibi witnesses as a separate factual basis for a *Strickland* claim. Because this specific factual basis was not fully and fairly presented to the state courts in one complete round of state court review, it is procedurally defaulted. *See id.*

*9 And even if this factual basis were not defaulted, it lacks merit in any event. Even Owens acknowledged at the hearing that he was not with Tasha or any of his other potential "alibi" witnesses at the time of the murder. According to Owens, on the afternoon of September 22, 1999, he saw Tasha at 3 p.m., and Karee, Jamil, Greg, Kenworth, and Will around 5 p.m. at Tasha's house. R. 126 at 129-32. None of these witnesses, as Owens now admits, would have provided an alibi for him for the time of the murder, which occurred at 8:30 p.m., *see id.* at 229, at which time Owens was purportedly with Blackman

and Minor. Thus, even if counsel was deficient for curtailing his investigation into Tasha and for failing to sufficiently investigate Owens's other identified friends, Owens can certainly not demonstrate any prejudice by counsel's omissions in this regard given Owens's admission that these witness would not have been able to provide exculpatory testimony at trial.

2. Failure to investigate Minor and Blackman as potential alibi witnesses and failing to call them to testify at trial

Turning to the other factual bases of Owens's ineffective assistance claim, Owens claims that Rago was ineffective for failing to investigate Minor and Blackman as potential alibi witnesses and further by failing to call them as alibi witnesses at trial. But the evidence adduced at the evidentiary hearing demonstrates that the investigation Rago conducted into Blackman and Minor was within the bounds of reasonable professional judgment and not deficient under *Strickland*.

Beginning with Rago's investigation into Minor, Rago admitted at the evidentiary hearing that he conducted no investigation into Minor. Rago explained that the reason for this omission was because Owens never told Rago that Minor was a potential alibi witness. R. 125 at 60 ("That name never came to us."); *id.* at 128 ("If we had been given a name Sheila Minor, yes. Just as we did with these two [Blackman and Tasha], we certainly would have tried to find Sheila Minor too."); *id.* ("Never knew of a Sheila Minor, never."). Had Owens done so, Rago claimed, Rago would have attempted to locate her like he did with the witnesses Owens actually identified—Blackman and Tasha. *Id.*

at 128. Rago acknowledged that Owens asserted a potential alibi defense soon after he was arrested for Nelson's murder. *Id.* at 182-83. The initial alibi was that Owens was drinking with friends at the time, not that he was with Blackman and Minor at Minor's house, his current alibi defense. But according to Rago, Owens only told him about two potential alibi witnesses: Blackman and "Tasha." *Id.* at 51-52. From Rago's perspective at the time, all he knew regarding a potential alibi for Owens was that Owens was with Blackman and Tasha at Tasha's house between 5 and 10 p.m. on the night of Nelson's murder. Based on that information, Rago instructed his investigator, Zupancic, to locate and interview them. Indeed, Rago's testimony in this regard is credible given the records in the Public Defender's investigative files. Minor's name, unlike Blackman and "Tasha's" names, was nowhere in those records. Given that Blackman and Tasha were in the investigative records, if Owens had, in fact, told Rago about Minor, then her name would have been in the records too. It is not. Because Owens never identified Minor to Rago as a potential alibi defense—an assertion from Rago that the Court fmds to be supported by Rago's testimony regarding his past practices and thus credible—Rago cannot be said to have rendered deficient performance for failing to investigate (and call to testify) a potential witness about whom Owens had not made him aware.

As for Rago's investigation into Blackman, the Court finds that investigation to be constitutionally reasonable. After Owens identified Blackman as a potential alibi witness, Rago instructed Zupancic to locate and interview him Zupancic spoke with Blackman on the telephone, and he told her that

while he was friends with Owens and that he regularly saw Owens, he could not recall whether he was with Owens on the night of the murder. Zupancic made further arrangements to follow-up on this conversation with a face-to-face interview, but Blackman failed to appear where the two had arranged to meet. Following this missed appointment, Zupancic made further efforts to find Blackman until the week before Owens's trial, but these efforts proved unsuccessful. Rago stated that it would have been his general practice to ask for Owens's assistance in contacting Blackman since Blackman was proving uncooperative. R. 125 at 53. These efforts to investigate Blackman's potential as a witness were reasonable under the circumstances known to Rago at the time. Finding Blackman uncooperative and given the uncertainty regarding his potential testimony, counsel instead of pursuing the Blackman lead reasonably chose to focus on attacking the credibility of the State's two eyewitnesses. The Court cannot say that counsel was deficient for pursuing this option where it cannot be said that Blackman possessed any exculpatory information.

*10 Nor was Rago deficient for failing to call Blackman to testify at Owens's trial given the testimony Blackman likely would have given. At best, Blackman would have testified that he was not sure whether he was with Owens on the night of the murder. At the evidentiary hearing, Blackman initially thought he remembered being with Owens on September 21, 1999 because his friend, Manny, had a birthday party that night, and he remembered being at that party with Manny and Owens. And he recalled spending the following night with Minor and Owens assembling Minor's furniture. But Blackman later

testified that he could not be sure even what year Manny's birthday party took place. Ultimately, Blackman could only definitively say that there was a night when he celebrated Manny's birthday with Owens and another night when he and Owens spent the night at Minor's home. But he could not say for certain what night that was. That was the reason, Blackman said, that he never reached out to Owens's defense attorney because he was not sure that he was with Owens that night. Blackman's potential testimony does not establish that he was with Owens at the time the murder took place, and his weakness as a potential witness was highlighted by the Court's questioning at the hearing:

Q [the Court]: So it's clear, you believe your friend Manny's party was on September 21st because that's his birthday.
A [Blackman]: Mm-hmm, correct.
Q You're not sure of the year of it that—well, putting two events together.
A Right.
Q There's Manny's birthday, and there's a night you put a table together in Sheila's house, correct?
A Correct.
Q Do you know if the putting the table together at Sheila's house occurred after the night of the birthday party?
A I'm not a hundred percent sure.
***

R. 125 at 277-78. The uncertainty at the hearing was not the result of the passage of time. Zupancic testified that Blackman was similarly uncertain when she interviewed him years earlier. [9] Counsel cannot be

said to have been deficient by failing to present such ambivalent testimony at Owens's trial for such testimony would not have helped Owens's defense.

Moreover, in light of the testimony presented at the hearing and due to her bias and familial relation to Owens as his mother, the Court finds the averments in Bertha Marie Owens's two affidavits regarding counsel's investigation to be incredible. *See e.g., Johnson v. Loftus,* 518 F.3d 453,457 (7th Cir.2008); *Hayes v. Battaglia,* 403 F.3d 935,938 (7th Cir.2005). Ms. Owens indicated that she told Rago that Blackman and Minor wanted to testify about an alibi defense and that she gave him both their numbers and contact information, but Rago failed to interview them or investigate the defense, despite assurances that he would. R. 152-2 at 59-60, 106. But at the evidentiary hearing, Rago denied that this occurred, because if Ms. Owens had, in fact, given Rago this information, he would have immediately acted on it. R. 125 at 162-64. Moreover, Blackman acknowledged during his testimony that he never told Owens's mother that he wanted to testify at Owens's trial. *Id.* at 263-64.[10] Based on Rago's and Blackman's demeanor at the hearing, the Court finds their testimony on these points to be credible. On the other hand, the Court finds Ms. Owens's statements in her affidavit suspect. In particular, the Court finds credible Rago's testimony that if he had been given Minor's name as an alibi witness, either from Owens or Owens's mother, he would have investigated it, just as Blackman and Tasha were investigated.

3. Overall Representation

*11 In the end, Owens received constitutionally adequate representation. In evaluating counsel's representation, the federal habeas court examines not only the lawyer's claimed error "(of omission or commission)," but evaluates the "entire course of the defense." *Williams v. Lemmon,* 557 F.3d 534,538 (7th Cir.2009); *see also Richter,* 131 S.Ct. at 791 ("It is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy."); *Pole,* 570 F.3d at 934 (stating that under *Strickland,* federal habeas court must "assess counsel's work as a whole, and it is the overall deficient performance, rather than a specific failing that constitutes the ground for relief') (internal quotation marks omitted).

An analysis of Rago's overall representation here reveals that in addition to investigating Blackman, counsel investigated the other potential alibi witness Owens identified prior to trial. Zupancic was able to identify "Tasha" as Tasha Dugar and made multiple (though unsuccessful) attempts to track Tasha down. Counsel also visited the crime scene with Zupancic to gather information that would assist him in challenging the credibility of the State's eyewitnesses. Also, as part of Rago's representation, he subpoenaed documents from the Markham Police Department, R. 125 at 106-07; *see also* R. 140-2 at 4-5, and when the Department did not timely comply with that subpoena, Rago filed a successful petition for rule to show cause, R. 125 at 109-11; *see also R.* 140-2 at 6-9. Even though Rago was entitled to these materials under Illinois law, Rago testified that he subpoenaed them to make sure that he had access to them as early

in the process as possible so he could act on any pertinent information in them. R. 125 at 108. Rago also filed a motion to preserve evidence so that any evidence the police possessed would not be destroyed or misplaced. R. 125 at 109; *see also* Resp. Exhs. 2 & 3. After Rago received the materials from the police, Rago consulted with Owens who would have told him the basis on which to file a motion to quash arrest, which counsel filed. R. 125 at 112-13; *see also* R. 140-2 at 13. Rago further filed a formal motion for discovery so that he received information from the State more quickly. R. 125 at 115; *see also R.* 140-2 at 10-12.

Further, at trial, counsel advanced a reasonable doubt defense, attacking the testimony of the State's eyewitnesses. Rago impeached Johnnie's eyewitness testimony with: (1) his failure to immediately notify police after the murder occurred—he did not speak with police when he returned to the liquor store from the hospital, and indeed did not speak with police until six days later; (2) the inconsistencies between Johnnie's description of Nelson's assailant and Owens's actual appearance; and (3) the suggestiveness of the photo array from which Johnnie identified Owens—Johnnie described the attacker as "big and bulky" and agreed with counsel's characterization that Owens was the "biggest and the bulkiest" person in the photo line-up. R. 152- 1 at 142. Rago elicited on cross-examination of Detective White that Owens was the only individual in both the photo array and the lineup. *Id.* at 145. And Rago further brought out inconsistencies between Evans's account of the events and Johnnie's account, *id.* at 159-60, R. 112-1 at 109-10, and Evans's prior criminal history and the deal he made with the State for his truthful testimony, R. 112-1 at 81-84. Rago also forcefully stressed the credibility issues regarding Johnnie and

Evans in his closing argument. *Id.* at 100-17. And finally, after Owens was found guilty, Rago filed a motion for new trial in which counsel raised numerous grounds for relief. R. 140-2 at 28-30.

*12 Owens questions Rago's belated attempt to investigate Blackman as a potential witness and for curtailing that investigation when Blackman proved uncooperative. According to Owens, Rago was on notice three days after Owens's arrest that Owens had a potential alibi, but Rago waited nearly ten months before attempting to locate him. Owens also claims that Zupancic's efforts to locate Blackman were minimal, citing Zupancic's acknowledgment that she could have done more to locate Blackman after their failed in-person meeting. But accepting Owens's first argument would require the Court to credit Owens's speculative testimony that he gave Rago actionable information before Rago asked Zupancic to locate and interview Blackman and Tasha and that Rago then failed to act on it. Instead, the Court credits Rago's testimony that it was his general practice to have acted on such information immediately, and if the reports reflected no action on his part, that was because Owens had failed to pass that information to him. *See Williams,* 557 F.3d at 540. Rago cannot be faulted for failing to act on information that he was not given.

Owens's post-trial correspondence to Rago supports Rago's testimony in this respect. In the Court's view, those detailed and well-written letters demonstrated that they were written by an intelligent individual. In those letters, Owens sets forth what he perceived to be weaknesses in the State's case and numerous (nonfrivolous) bases for a motion for a new trial. R.

126 at 141– 47,149-52. Notably, nowhere in those letters did Owens express dissatisfaction with Rago's failure to call Minor as a witness—indeed, nowhere is Minor even mentioned—and only one time is Blackman even referenced. *Id.* In fact, Owens's post-trial letters were generally complimentary to Rago in his evaluation of Rago's efforts. *Id.* at 141 ("Mr. Rago, I would like to truly commend you on your valiant effort on defending me."). Given these letters, the Court does not credit Owens's testimony that Owens provided actionable information regarding his alibi defense that Rago ignored.

And even if it were true that Rago and Zupancic could have done more to locate Blackman and they were deficient in this one respect, that one deficiency does not render their overall work for Owens deficient. *See Williams,* 557 F.3d at 538. Ultimately, Rago believed that based on the (reasonable) efforts they had made to investigate Owens's alibi defense, Owens did not have a viable alibi defense. Blackman's potential testimony did not provide Owens a definitive alibi for the night of the murder and thus would not have aided Owen's alibi defense, and Blackman was proving uncooperative. Nor were Rago and Zupancic able to locate Tasha, Owens's other proposed alibi witness. R. 125 at 49, 139. And Rago and Zupancic received no other information from Owens regarding any other potential alibi witness. *Id.* at 49-52. At that time, Owens made no mention of Minor. Rago acknowledged that without the testimony of these witnesses, he could still have presented an alibi defense based on Owens's testimony that he was not at the crime scene and provided he could locate him, the testimony of Blackman who would have testified to his version of the alibi defense. *Id.* at 139. And

true, a reasonable doubt defense and an alibi defense are not inconsistent defenses. But instead of presenting both defenses, Rago reasonably made a strategic decision to focus on attacking the credibility of the State's two eyewitnesses, which he did fairly effectively, despite the ultimate conviction. *Id.* at 49,139. Based on the testimony presented and the present record, it cannot be said that this decision was deficient under *Strickland*.

D. Prejudice

Even if Rago's omissions constitute deficient performance, Owens has failed to demonstrate *Strickland* prejudice. In assessing prejudice, "[i]t is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Instead, "*Strickland* asks whether it is 'reasonably likely' the result [of the trial] would have been different." *Richter*, 131 S.Ct. at 792 (quoting *Strickland*, 466 U.S. at 696). To make this showing, Owens need not simply demonstrate that counsel's deficient conduct "more likely than not altered the outcome" in the case, but rather "[t]he likelihood of a different result must be substantial, not just conceivable." *Richter*, 131 S.Ct. at 792.

*13 As discussed above, Blackman could not provide an alibi for Owens on the night of Nelson's murder because Blackman could not recall if he was with Owens that night. If Blackman, one of Owens's good friends, had offered the same equivocal testimony he offered at the hearing at Owens's trial—and from what counsel knew at the time from Zupancic's telephone conversation with him, that seemed a likely possibility—there is no reasonable probability that

Owens would have been acquitted given the evidence that was presented in support of Owens's guilt. Indeed, Blackman's ambivalent testimony must be considered weak when compared to the evidence the State marshaled at Owens's trial. At trial, Johnnie and Evans both positively identified Owens as Nelson's murderer, and their accounting of the event was fairly consistent with each other. Johnnie testified that he saw Owens hit Nelson from a few feet away, and at a time when it was not yet totally dark and the area in front of the liquor store was illuminated by street lights and lights near the liquor store's front doors. He also saw Owens's face immediately prior to and after the attack. Johnnie's post-attack description of the offender and his clothing was consistent with Owens's actual appearance and Evans's testimony regarding Owens's appearance that night. Shortly after Nelson's murder, Johnnie selected Owens's photo from a photo array as the murderer, and he identified Owens in both a lineup and in court, expressing a high level of certainty in his identifications. R. 152-1 at 161-63 (state appellate court's analysis of the reliability of Johnnie's eyewitness identification).

Add to that Evans's testimony that on that evening, there was sufficient light to see the events in question, and his identification of Owens as Nelson's murderer. True, he twice identified the wrong photo when asked to select the photo of Owens from the photo array that he viewed at the police station, but he successfully identified Owens from a photo of the lineup that he viewed at the police station after Owens's arrest, when he identified Owens to police as the murderer.

Accordingly, given this evidence, even if counsel had presented Blackman's testimony, it cannot be said that given the evidence demonstrating that Owens killed Nelson, there is a reasonable probability that the result of Owens's trial would have been different. *See Brady*, 711 F.3d at 828 (holding that failure to present "marginally exculpatory" testimony did not prejudice habeas petitioner).

In the end, Owens received the constitutionally effective counsel that he was entitled to receive under the Sixth Amendment and the Court makes the following findings:

• Owens failed to argue to the state courts in one complete round of state court review that counsel was ineffective for failing to investigate Tasha and other potential alibi witnesses. And regardless of whether the claim has been properly preserved for federal habeas review, there is no reasonable probability that the result of Owens's trial would have been different had Tasha's testimony or the testimony of the other "alibi" witnesses had been presented. Even Owens testified at the hearing that all of these "alibi" witnesses (Tasha, Karee Williams, Jamil, Greg, Kenworth, and Will) only placed Owens at some location up to 5 p.m. or earlier, which does not aid an alibi for a murder that occurred at 8:30 p.m.

• Counsel did not render deficient performance when he failed to investigate Minor as a potential alibi witness because despite Owens's claim to the contrary, the Court finds Owens never told Rago about Minor. Rago could not have been deficient for failing to investigate a witness of whom he was not aware.

• Counsel conducted a reasonable investigation into Blackman as a potential alibi witness, and when Blackman proved uncooperative and revealed that he had, at best, marginally exculpatory testimony, counsel reasonably decided to focus his efforts on presenting a reasonable doubt defense and attacking the credibility of the State's eyewitnesses. Nor can Owens demonstrate that he would have been acquitted had counsel called Blackman to testify at trial given his equivocal testimony.

• Finally, despite Owens's claim of the insufficiency of Rago's representation, an examination of counsel's overall efforts reveals that the work Rago performed for Owens, while perhaps curtailed in some respects, cannot be deemed deficient under *Strickland*. Nor did Owens suffer prejudice from counsel's omissions given the ambivalent testimony Rago is faulted for not presenting and the evidence presented in support of Owens's guilt at trial.

II. Counsel's Advice to Owens Regarding Owens's Right to Testify

A. Factual Background

*14 At the evidentiary hearing, Owens testified that at one or two meetings before trial, he told Rago that he wanted to testify that he was not at the scene of the murder. R. 126 at 120. Owens said that he had another discussion with Rago during the trial about testifying, but Rago told him that given William Evans's "botched" testimony regarding the photo array identification, Owens's testimony was

unnecessary. *Id.* at 121-22. According to Owens, Rago never explained why Owens should not testify, nor was there any other discussion with Rago regarding his right to testify. *Id.* at 122, 126-27 But yet he agreed to follow Rago's recommendation that Owens not testify. *Id.* at 122-23. The trial judge also, Owens claimed, never asked him whether he wanted to testify. *Id.* at 123.

During cross-examination, Owens admitted that Rago simply recommended that he not testify and that Owens followed Rago's recommendation. *Id.* at 206-07. He further added during questioning by the Court that Rago never absolutely told him that he could not testify or that Owens had no right to testify, but Owens inferred from Rago's discouraging him from testifying that he should not testify; Owens nevertheless insisted that he did not know that he would have been allowed to testify if he had wanted to. *Id.* at 222-25. He acknowledged, however, that in his post-trial correspondence to Rago he never mentioned that Rago prohibited him from testifying or that he had wished to testify. *Id.* at 148, 152-53; *see also* R. 140-3 at 4-10. Owens also admitted that he had a stepfather who was a criminal defense attorney, R. 126 at 98, 215-16, and that Owens, through a number of misdemeanor and felony arrests, had prior experience with the criminal justice system, *id.* at 184-87.

Rago testified that he did not specifically recall advising Owens regarding his right to testify at trial, but his general practice would have been to discuss that right with a client multiple times during the course of his representation. R. 125 at 60, 153. Rago said that he would have even specifically advised

Owens of that right after the State rested its case and before the defense rested theirs. *Id.* According to Rago, the general practice of the trial judges at the Markham County courthouse was to admonish criminal defendants of their right to testify, but if a trial judge omitted that admonishment, then either the prosecutor or Rago would remind the judge to ask the defendant about it. *Id.* at 65. Although Rago acknowledged that the record did not reflect an on-the-record admonishment of Owens regarding his right to testify, Rago believed that the trial court admonished Owens of his right to testify off the record.[11] *Id.* at 63, 187.

Rago reiterated that when representing clients, he would advise them of their right to testify and further advise them that the decision to testify was theirs. *Id.* at 154. Thus, if Owens had demonstrated a desire to testify, Owens would have testified. *Id.* at 150 ("If [Owens] wanted to testify, I would not block him in any way, shape, or form."), 151 ("The ultimate decision [of] whether or not [Owens] [would] testify rests with him "); 154 (stating the client gets the "final say" on whether he testifies at trial). Rago denied that he ever forbid Owens from testifying. *Id.* at 155.

B. *Strickland* Claim

Owens's claim regarding his right to testify has evolved since his state court litigation. On direct appeal, Owens argued that Rago "failed to allow [him] to testify" and "did not put [him] on the stand to testify on his own behalf." R. 152-1 at 37-38. In his postconviction petition, Owens alleged that he received ineffective assistance when Rago "would not

allow [Owens] to testify at trial." R. 152-2 at 25. According to Owens's state petitions, Rago "forbid [him] [from] testify[ing][on] his own behalf." *Id.* at 36. Owens elaborated on this claim with his own affidavits in which he averred that "[a]lthough [he] felt [he] needed to testify at trial ... Rago told [him] not to worry, meaning that [Owens] would be acquitted." R. 152-2 at 98. Owens alleged that neither Rago nor the trial judge explained to him that he had a right to testify at trial and that the decision regarding whether to testify was his. *Id.* And had he known it was his decision to testify, Owens says, he would have testified that he did not murder Nelson and that at the time, he was with Minor and Blackman. *Id.* To further support this claim, Owens presented the affidavit of Owens's mother in which she stated that she informed Rago on several occasions that Owens wanted to testify about his alibi defense, but that Rago decided not to "allow" Owens to testify because the State's case against Owens was "so weak ... that he would never get convicted." *Id.* at 59-60. Owens then brought the claim raised in his state court proceedings in this federal habeas proceeding, claiming that Rago forbade him from testifying and that neither Rago nor the judge explained that the decision to testify was his alone to make.

***15** Owens now argues in his post-hearing brief that although Rago "never specifically told [him] not to testify, the import of his legal opinion was such that [Owens] believed that he could not testify." R. 140 at 113. Thus, it seems from Owens's post-hearing brief and his testimony at the evidentiary hearing that Owens claims now not that counsel prevented him from testifying at trial, but that counsel discouraged

him from testifying, and that this advice amounted to ineffective assistance of counsel.[12] *Id.* at 113-14. The Warden argues that Owens's claim regarding his right to testify, as now formulated, is procedurally defaulted because Owens never argued to the state courts that, while he made the ultimate decision whether to testify, counsel's advice to him regarding testifying amounted to constitutionally deficient advice. R. 150 at 19. Owens failed to respond to the Warden's argument.

"A state petitioner seeking a writ of habeas corpus in federal court must first exhaust the remedies available to him in state court, thereby giving the State [courts] the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Cheeks v. Gaetz,* 571 F.3d 680,685 (7th Cir.2009) (internal citation and internal quotation marks omitted). To afford the state courts this opportunity, a habeas petitioner must fully and fairly present his constitutional claim to the state courts before seeking relief in federal court. *Gray v. Hardy,* 598 F.3d 324,327 (7th Cir.2010). Fair presentment of a federal claim to the state courts contemplates presentment of both the claim's operative facts and controlling legal principles. *Gonzales v. Mize,* 565 F.3d 373,380 (7th Cir.2009).

Here, the operative facts underlying Owens's current claim—counsel misadvised Owens not to testify or gave him advice which wrongly influenced his decision not to testify—are wholly different than the operative facts underlying Owens's original claim—counsel forbade or prevented him from testifying. The state courts were never presented with the operative facts that form the basis of the claim that Owens currently

advances, and thus never had a full and fair opportunity to address Owens's claim that counsel's advice regarding Owens's decision whether to testify was ineffective assistance under *Strickland*. Accordingly, Owens's presentment of his current claim for the first time in the Court and failure to present the claim's operative facts at all in the state courts renders it procedurally defaulted on federal habeas review.

But even if the Court were to evaluate Owens's current claim on the merits, it lacks merit in any event. "[I]ncorrect advice that induces a defendant to waive his right to testify can constitute ineffective assistance." *Starkweather v. Smith*, 574 F.3d 399, 403 (7th Cir.2009) (emphasis omitted). To prevail on this claim, Owens must demonstrate that counsel's advice fell below an objective standard of reasonableness, and that there is a reasonable probability that had Owens testified he would have been acquitted of murder. Owens can show neither.

Owens testified that prior to trial, he told Rago about his desire to testify, and Rago stated his opinion that Owens need not testify given the weaknesses in the State's case. R. 126 at 120, 206. Rago at no time told Owens that he could not testify. *Id.* at 222. Owens trusted counsel's judgment, agreed to follow Rago's recommendation, and decided not to testify. *Id.* at 207. Owens testified that during the trial, he again discussed his right to testify with Rago, and at that time, Rago recommended that Owens need not testify, particularly given Evans's "botched" photo array selection. *Id.* at 121. Owens again agreed to follow Rago's recommendation, believing that his testimony was not critical evidence given the State's evidence,

and in none of his post-trial correspondence with Rago did he mention that he had wanted to testify or that he disagreed with counsel's recommendation that he not testify. *Id.* at 122-23, 222.

*16 There is no indication from Owens's testimony that Rago misinformed him of his rights or his chances of acquittal. Indeed, Rago testified that he would never have predicted an outcome of a trial to a client. R. 125 at 148 ("I never, ever predict an outcome regarding either a jury trial or a bench trial with my clients."). Thus, the Court is left with Owens's allegations that counsel advised him not to testify and pursuant to that recommendation, Owens decided not to testify. Even assuming Rago advised Owens against testifying, Owens has not demonstrated that this advice would have been objectively unreasonable under the circumstances as they existed at the time. Rago may have believed that it was better strategy to focus Owens's defense on aggressively attacking the credibility of the State's eyewitnesses by challenging the reliability of their identifications. *Id.* at 149; *see also R.* 112-1 at 100-17 (Rago's closing argument). Or he may have believed the State's case was weak, particularly after Evans's testimony regarding the photo array, and decided to rely on that trial strategy rather than also running the risk of Owens's testifying and relying on Owens's uncorroborated alibi defense. Such a decision was not unreasonable and outside the bounds of reasonable professional assistance. *See United States ex rel. Parker v. Chandler,* No. 09 C 4321, 2011 WL 221834, at *10 (N.D.Ill. Jan. 24, 2011).

Nor can Owens demonstrate that he has met *Strickland* 's prejudice requirement. Even if Owens

had testified that he was not present at the scene at the time of the murder, there is no reasonable probability that he would have been acquitted. His alibi was uncorroborated—Blackman would not have been able to confirm Owens's whereabouts at the time of the murder. Johnnie and Evans testified that they saw Owens commit the murder, and despite Rago's attempts to discredit their identifications, the trial court found their testimony credible. It cannot be said that if Owens's unsupported and self-serving testimony that he was with friends that night had been presented that would have resulted in the trial court's acquittal of Owens for Nelson's murder. Because Owens cannot demonstrate either counsel's deficient performance or prejudice resulting from counsel's performance, Owens cannot prevail on his current claim regarding his right to testify.

III. Certificate of Appealability

Because Owen's ineffective assistance of counsel claim lacks merit, his petition for a writ of habeas corpus is denied. Rule 11(a) of the Rules Governing § 2254 Cases provides that the district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." To obtain a certificate of appealability, a habeas petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This demonstration "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000) (internal quotation marks omitted); *see also*

Lavin v. Rednour, 641 F.3d 830, 832 (7th Cir.2011). And where a petition is disposed of based on a procedural bar, without reaching the merits of the underlying constitutional claims, a certificate of appealability should issue only if reasonable jurists would fmd the adjudication of the antecedent procedural ruling "debatable." *Slack,* 529 U.S. at 484-85; *see also Lavin,* 641 F.3d at 832.

The Court's earlier denial of Owens's inordinate delay and Fourth Amendment claims rests on well-settled precedent governing procedural default and the non-cognizability of these claims in § 2254 proceedings. The Court's further determination that Owens's claim regarding the state trial court's admission of the photo array and lineup identification was procedurally defaulted is not a conclusion that reasonable jurists could debate. Nor is the Court's rejection of Owens's improper extrajudicial findings claim on the merits a finding that is debatable. Finally, the Court's denial of both grounds of Owens's ineffective assistance of counsel claim rests on well-settled precedent governing procedural default. Moreover, based on Rago's and Zupancic's credible testimony regarding their investigation into Owens's alibi defense, Blackman's credible testimony regarding the limited extent to which he remembered being with Owens the night of the murder, and Rago's credible testimony regarding his advising of Owens about his right to testify, Owens has not demonstrated that the application of *Strickland* to Owens's ineffective assistance claim presents questions that jurists of reason could debate should be resolved in a different manner. Accordingly, certification of any of Owen's habeas claims for appellate review is denied.

Conclusion

*17 For the foregoing reasons, Owens's petition for a writ of habeas corpus is denied, and the Court declines to issue a certificate of appealability for any of his claims.

Footnotes

1. On January 14, 2013, Owens's § 2254 petition was reassigned to the undersigned judge's calendar. R. 108.
2. The police did not obtain a warrant for Owens's arrest. Owens filed a motion to quash his arrest, arguing that the police lacked probable cause to effect his warrantless arrest on the homicide charge. The state appellate court found that based on Johnnie and Evans' photo array identifications, the police had probable cause to arrest and detain Owens for Nelson's murder. R. 152-1 at 151-52.
3. The Court's prior opinion recounts the claims that were raised in each round of review in Owens's direct appeal. *See Owens*, 2012 WL 1416432, at *5-6 (Pallmeyer, J.).
4. Owens's initial *pro se* postconviction petition was not included in the exhibits the Warden submitted to the Court
5. Minor and Bertha Marie Owens died in 2007 and 2011, respectively. R. 126 at 62-65.
6. Citations to the transcripts of the evidentiary hearing are noted as R. 125 (the transcripts from March 18, 2013) and R. 126 (the transcripts from March 19,2013).
7. Owens said at the hearing that when he gave Rago the names of his friends, he only gave Rago their first names because he did not know their last names. Through her investigation, Investigator Zupancic was later able to identify Tasha as Tasha Dugar. R. 125 at 136-38; R. 126 at 17-24.
8. Owens makes the argument that Blackman could not say with certainty that he was *not* with Owens at the time of the murder. Such testimony would not have been helpful Blackman's trial. The only helpful testimony would be if Blackman could affirmatively testify that he *was* with

Owens at the time of the murder. Blackman could not so testify.

9. Blackman provided different information in the affidavits attached to Owens's postconviction petitions. But Blackman's testimony at the evidentiary hearing effectively disavowed the averments in those affidavits
10. Blackman acknowledged later in his testimony that Owens's mother asked him if he would testify for Owens if it became necessary. R. 125 at 278
11. The Court finds Rago's testimony in this regard somewhat perplexing. But although the Court does not credit Rago's recollection regarding the trial court's off-the-record admonishment to Owens regarding his right to testify, that does not change the result here.
12. Owens's earlier claim that he did not know that he had the right to testify is belied by the testimony he gave at the evidentiary hearing. According to Owens, he agreed to Rago's recommendation that he not testify, meaning that he necessarily was aware of his right to testify. R. 126 at 206-07.

2014 WL 1416432
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois,
Eastern Division.

UNITED STATES of America, ex rel. Larry OWENS, Petitioner,

v.

Gerardo ACEVEDO, Warden, Hill Correctional Center, Respondent.

No. 08 C 7159 | April 23, 2012 | As Amended May 29, 2012

Attorneys and Law Firms
Robert S. Nathan, Law Office of Robert S. Nathan, Chicago, IL, for Petitioner.
Garson Steven Fischer, Chicago, IL, for Respondent.

MEMORANDUM OPINION AND ORDER

REBECCA R. PALLMEYER, District Judge.

*1 At a bench trial on November 8, 2000, Petitioner Lawrence Owens ("Owens" or "Petitioner") was convicted of first degree murder for beating Ramon Nelson to death with a baseball bat outside a liquor store. Owens was sentenced to 25 years in prison. He challenged his conviction in an unsuccessful direct appeal and by way of a petition for postconviction relief; his state remedies have been exhausted. In this action pursuant to 28 U.S.C. § 2254, Owens raises five

grounds for relief: (1) due process violations for the delay in the state trial court's resolution of his postconviction relief petition; (2) lack of probable cause for his arrest; (3) admission of improperly suggestive photo array and line-up evidence at trial; (4) the trial court's reliance on improper "extrajudicial" findings regarding Owens's motive, based on evidence not produced at trial; and (5) ineffective assistance of counsel for his trial counsel's failure to investigate Petitioner's alibi or call alibi witnesses to testify, and for denying Owens his right to testify on his own behalf. For the reasons explained here, the court denies the petition with respect to Claims 1- 4, but concludes that Petitioner is entitled to an evidentiary hearing of limited scope on his ineffective assistance on counsel claims (Claim 5).

FACTUAL BACKGROUND

On habeas review, this court presumes the facts as found by the state court correct, absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). The following facts are derived from the Illinois appellate court's order affirming Petitioner's conviction on direct appeal. (Order, *People v. Owens,* No. 1-01-0341 (Ill.App. 1st Dist. Dec. 4, 2002) (hereinafter, "Direct Appeal Order"), Ex. D to Resp't's Answer.)

I. **Evidence at Trial**

On the evening of September 22, 1999, sometime after 8:00 p.m., an assailant, later identified by eyewitnesses as Owens, attacked seventeen-year-old Ramon Nelson with a baseball bat outside a liquor store and lounge in Markham, Illinois, resulting in

Nelson's death. *(Id.* at 5-7, 11-12, 14.) Maurice Johnnie, one of the two eyewitnesses who appeared at trial, testified that he was in the passenger's seat of his own car with two friends, parked about ten feet from the entrance to the liquor store and facing that direction. *(Id.* at 6.) It was not quite dark yet, and the front of the store was illuminated by streetlights and lights from the liquor store's front door. *(Id.)* Eventually, one friend entered the liquor store, leaving Johnnie and the other friend, Johnny Morgan, in the car. *(Id.)*

While Johnnie and Morgan waited in Johnnie's car outside the liquor store, Nelson approached the car on a bicycle and spoke to Morgan, who was seated on the driver's side. *(Id.)* Johnnie did not know Nelson. *(Id.)* After speaking to Morgan for three or five minutes, Nelson proceeded down the sidewalk, away from the passenger's side of the car, towards the entrance of the liquor store. *(Id.* at 6-7.) Johnnie then observed a man walking down the sidewalk in the opposite direction and toward Nelson. *(Id.* at 7.) Nelson attempted to turn his bicycle around, but the man caught up with him and hit Nelson on the head with a baseball bat. *(Id.)* Nelson fell from his bicycle into the doorway of the store, where the assailant hit him in the head a second time, forcefully and with both hands on the bat. *(Id.)* After the second hit, the attacker turned and walked back in the direction from which he had come. *(Id.)* Johnnie testified that he saw the attacker's face on his approach, but got his best look after the attacker had finished his assault. *(Id.* at 9.) Johnnie and Morgan then went to check on Nelson, found him unconscious and groaning, and, at Morgan's insistence, took him to the hospital in Johnnie's car. *(Id.* at 7.) Nelson died in the hospital

the next day as a result of multiple skull fractures. *(Id.* at 14; Markham Police Department Case Report, Brief of Defendant—Appellant Lawrence Owens in *People v. Owens,* No. 1-01-0341 (hereinafter "Peter's Direct Appeal Brief'), Ex. A to Respites Answer, at A-7 to-8.)

*2 The second eyewitness to testify at trial was William Evans. (Direct Appeal Order at 10.) Evans, who had a previous drug conviction and was in custody on another drug charge at the time of trial, acknowledged that he was testifying in return for a recommendation of probation. *(Id.* at 10-11.) Evans testified that he was on the same block as the liquor store, and that he spoke to Nelson, whom he knew from the neighborhood, for about a half hour before the attack. (*Id.* at 11.) After their conversation, Evans saw Nelson proceed toward the entrance of the liquor store on his bicycle. *(Id.)* At the time the attack began, Evans was retrieving a bucket at the northeast corner of the block in order to wash a car. *(Id.)* Evans was first made aware of the attack when he heard a sound like wood splitting. (*Id.* at 12.) Evans looked around the corner of the building and saw the assailant hitting Nelson with the bat. *(Id.)* While Evans did not know the assailant, he recognized the assailant as someone who had visited the liquor store and lounge in the past. *(Id.)*

Evans hollered, "hey, what is going on," whereupon the assailant and another man ran off past him. *(Id.)* Following the attack, Evans went to see Nelson, and helped put Nelson into Johnnie's car. (*Id.* at 13.) Immediately after the incident, Evans briefly spoke with police officers, described the approximate height and weight of the two individuals, and informed them

that he had recognized the assailant from the neighborhood. *(Id.)*

Johnnie did not speak with police officers on the night of the incident (*id.* at 8), and he gave a false name and address when he dropped Nelson off at the hospital. (Markham Police Department Case Report.) Responding officers at the scene of the crime learned the license plate number of the car that transported Nelson to the hospital, however, and Detective White was able to identify Johnnie from the vehicle's registration. *(Id.)* Detective White contacted Johnnie, who agreed to an interview at the Markham police station on September 28, 1999, a week after the incident. *(Id.)* Johnnie described the attacker as a large black male, approximately 6'2" to 6'4" weighing 220 to 240 pounds, and dressed in brown. (Direct Appeal Order at 8.) Detective White compiled a photo array based on Johnnie's description. *(Id.* at 9.) Johnnie selected Owens's photo from the array as the photo of the individual who attacked Nelson. Detective White testified at trial that he never said the assailant was in the array and never made any suggestive remarks regarding the array. *(Id.)*

Evans also viewed the photo array at the station on September 28, 1999, and also described the assailant as a large black male, dressed in brown or tan. (*Id.* at 3.) Detective White testified that Evans identified Owens as the person who attacked Nelson. *(Id.)* At trial, however, when asked by the prosecutor which photo in the array he had identified as the assailant's, Evans pointed to a photograph of a person other than Owens. (*Id.* at 12 .) When given another opportunity by the prosecutor, Evans again failed to select Owens's photograph. *(Id.)*

*3 Following the photo identifications, Detective White directed his fellow officers to be on the lookout for Owens. (*Id.* at 4.) No arrest warrant was issued, but Detective White informed Officer Mike Alexander on September 29, 1999, that Owens, also known as "Big 0," was wanted in connection with a murder investigation. *(Id.)*

On October 26, 1999, Officer Alexander observed a blue Mercury Topaz speed by his unmarked squad car, traveling fifty miles per hour in a twenty-mile-per-hour zone. (*Id.* at 4.) According to Officer Alexander, the car did not stop when he activated his emergency lights and siren. *(Id.)* Instead, the Topaz accelerated through a stop sign and proceeded northbound, with Alexander in pursuit. *(Id.)* When the Topaz eventually pulled over, Owens exited the vehicle and ran northbound through a crosswalk. *(Id.)* Alexander gave chase and caught Owens a block and a half away. *(Id.)* At a hearing on Owens's unsuccessful motion to quash his arrest, Owens denied that he was speeding or that he ran a stop sign. (*Id.* at 2-3.) He claimed that he did not see the squad car until thirty seconds before he pulled over, and that he walked, not ran, from the car. (*Id.* at 3.) Owens did not deny, however, that he was driving the car. *(Id.)* Alexander placed Owens under arrest and transported him to the Markham police station when Owens could not produce a driver's license. (*Id.* at 4-5.)

On reaching the station, Alexander informed Detective White that Owens was in custody. (*Id.* at 5.) On October 27, 1999, witnesses Johnnie and Evans independently selected Owens out of a five-man lineup organized by Detective White. *(Id.)* Detective

White acknowledged that Owens was the only man who appeared in both the lineup and the photo array, and Johnnie acknowledged at trial that Owens was the "biggest and bulkiest" of the people in the lineup Johnnie asserted, however, that the identification was not based on height because everyone in the lineup was seated. (*Id.* at 8.) Prosecutors also showed Evans a photograph of the lineup at trial and asked Evans to pick out the individual he selected at the station. (*Id.* at 12.) Evans pointed out Owens in the lineup photograph after having failed to identify Owens as the person whom he had selected from the photo array. *(Id.)*

Following the witness testimony, the parties presented a series of stipulations regarding Nelson's cause of death, the fact that Nelson had forty bags of cocaine on him when attacked, and that a transcript of Evans's grand jury testimony was accurate. (*Id.* at 15.) After these stipulations, the state rested. *(Id.)* The court denied Owens's motion for a directed finding, and the defense rested without presenting any evidence. *(Id.)*

After closing arguments in Owens's bench trial, Judge Joseph Macellaio of the Circuit Court of Cook County stated:

After hearing this case, I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who [Owens] knew he was a drug dealer. [Owens] wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.

*4 (Excerpt of Trial Tr., App. to Peter's Direct Appeal Brief, at A-4 to-5.) It is unclear from the record what evidence the judge considered in support of this finding. Certainly, there was evidence that Nelson dealt drugs—he had a significant quantity of cocaine in small bags on his person. There is also evidence that at least one of the prosecution's two witnesses was involved in the illegal drug trade. No other record evidence suggests that Owens knew Nelson was a drug dealer, however, or that Owens himself was involved in drug trade. The judge sentenced Petitioner to twenty-five years' imprisonment. (*Id.* at A-6.)

III. Postconviction Affiant Testimony

In support of his ineffective assistance of counsel claims, Owens provides his own affidavits, and those of Tim Blackman, Sheila Minor, and his mother, Bertha Marie Owens. Owens has presented two sets of these affidavits. He filed the first set with the state court on September 11, 2003, in support of his *pro se* state petition for postconviction relief. The affidavits in the second set were prepared on dates ranging from 2006 to 2009. It is not clear from the record what occasioned the second set of affidavits or whether counsel participated in preparation of any of the affidavits.

Owens claims that he is innocent of the crime for which he was convicted. (Aug. 26, 2003 Owens Aff. ¶ 2, Ex. A to Pet'r's Reply.) He further asserts that he repeatedly told his trial counsel, Frank Rago, that he was innocent, that he had an alibi, and that he had alibi witnesses (Blackman and Minor). (*Id.* ¶ 3.) According to Owens, Rago promised that he would

investigate Owens's alibi and interview his alibi witnesses, and would call Owens and the alibi witnesses to testify on Owens's behalf. (*Id.* ¶ 4.) Despite these assurances, Owens contends, Rago failed to investigate or interview the alibi witnesses, and in fact forbade Owens from testifying on his own behalf. *(Id.)*[1] Owens explains that although he wanted to testify, Rago told him "not to worry, meaning that [Owens] would be acquitted." (Jan. 11, 2008 Owens Aff. ¶ 4.) Owens asserts that neither Rago nor Judge Macellaio explained that he had the right to testify or that the decision on whether to testify was Owens's alone. (*Id.* ¶¶ 5-6.) According to Owens, had he known this was his decision to make, he would have testified, and explained that he was innocent and had an alibi. (*Id.* ¶ 7.)

In his affidavit, Tim Blackman provides an account of his time with Owens on September 22-23, 1999. According to Blackman's account, at 2:30 p.m. on September 22, 1999, he and Owens were in front of Owens's house in Markham, Illinois when Sheila Minor drove by and asked them to help her assemble a dinette set later that evening. (July 18, 2003 Blackman Aff. ¶¶ 2-3, Ex. B to Pet'r's Reply.) Blackman and Petitioner met Minor at her father's house, down the street from Owens's home, at 6:15 p.m. (*Id.* ¶ 4.) From there, Minor gave Blackman and Owens a ride to Minor's home in Sauk Village, Illinois. (*Id.* ¶ 5.) They arrived at Minor's home at 7:20 p.m., assembled the dinette set, and then spent the remainder of the evening talking, eating, and watching television. (*Id.* ¶ 6.) Instead of heading back to Markham that evening, Blackman and the Owens spent the night at Minor's home, staying until 6:00 a.m. the following morning. (*Id.* ¶¶ 8, 9.) Blackman

says that prior to trial, he assured Owens's mother that he would testify to these events, but Owens's attorney never contacted, interviewed, or asked Blackman to testify. (*Id.* ¶¶ 10, 11.)

*5 Tim Blackman's second affidavit, prepared several years later, provides an account similar, though not identical, to the one set forth in his initial affidavit. According to that second affidavit, Blackman and Owens began their day at Blackman's home, not at Owens's home, and returned at 8:00 a.m., not 6:00 a.m., the following day. (Aug. 23, 2006 Blackman Aff. ¶¶ 7, 12, Ex. G to Pet'r's Reply.)

Sheila Minor also provided affidavits recounting her time with Owens and Blackman on September 22-23, 1999, the details of which mirror those set forth in Blackman's first affidavit. (July 18, 2003 Minor Aff., Ex. C to Pet'r's Reply.) Like Blackman, Minor was never contacted or interviewed by Owens's attorney and was never called to testify on Owens's behalf. (*Id.* ¶ 11.) Minor's second affidavit repeated her earlier account. (Jan 22, 2007 Minor Aff., Ex. H to Pet'r's Reply.)

Finally, Petitioner's mother, Bertha Marie Owens, provided affidavits concerning her active involvement in Petitioner's defense. Ms. Owens asserts that she told Frank Rago numerous times that Blackman, Minor, and her son wanted to testify and could provide an alibi defense. (Sept. 10, 2003 Ms. Owens Aff. ¶ 3, Ex. D to Pet'r's Reply.) She supplied Rago with Blackman's and Minor's names and contact information, but despite his numerous assurances about presenting the alibi defense, he never interviewed them or investigated the alibi. (*Id.* ¶¶ 4-

5.) According to Ms. Owens, Rago decided not to use the alibi defense because, he told her, the prosecutor's case against her son was too weak and he would never be convicted. (*Id.* ¶ 6.) Ms. Owens's second affidavit presents the same information. (Oct. 31, 2006 Ms. Owens Aff., Ex. I to Pet'r's Reply.)

PROCEDURAL HISTORY

Following trial, Owens appealed to the Illinois Appellate Court, First District. On direct appeal, Petitioner argued (1) that Petitioner was not proven guilty beyond a reasonable doubt; (2) that Petitioner's arrest and the lineup evidence should have been suppressed because the police had no probable cause to arrest for the murder charge; (3) that the photo array and lineup evidence should have been suppressed because they were overly suggestive; (4) that the judge's extrajudicial findings concerning Owens's motive for the crime denied Petitioner a fair trial; (5) that Petitioner was denied the effective assistance of counsel; and (6) that the sentence was excessive. (Pet'r's Direct Appeal Brief at 15, 25, 30, 32, 34.) Concerning Owens's ineffective assistance of counsel claim, his brief noted that his claim was limited on direct appeal to evidence in the trial record, which precluded consideration of evidence of his desire to testify or the availability of alibi witnesses. (*Id.* at 33 n. 3.) In a 2-1 decision, the Illinois Appellate Court affirmed the trial court's judgment on December 4, 2002. (Direct Appeal Order at 34.)

The court concluded that police had probable cause for both the warrantless arrest for the traffic violations and the subsequent arrest for murder based on the eyewitness identifications. (*Id.* at 17-18.)

Further, the court held that Owens had waived his right to the admission of the photo-array and lineup identifications by failing to raise a trial objection, and that in any event, Owens failed to establish that the identification procedures were impermissibly suggestive. (*Id.* at 19-22.) Concerning the sufficiency of the evidence, the court noted that the prosecution could carry its burden through the testimony of a single, credible eyewitness. (*Id.* at 22.) Although the court noted that Evans's testimony was "severely called into question"—both by his misidentification of Owens's photograph in the photo array at trial and by his deal to testify in exchange for a recommendation of lenient sentencing in his own criminal trial—the court concluded that "Johnnie's identification testimony is reliable and sufficient enough to support the trial court's guilty verdict." (*Id.* at 25-26.) In light of the identifications, the majority concluded that "the trial court's speculation as to defendant's motive for assaulting Nelson, will be construed as harmless error." (*Id.* at 27.) The dissenting judge disagreed with this analysis; the dissent observed that the trial judge had "manufactur[ed], suppl[ied], and interject[ed] its own evidence into a trial and then affirmatively stat[ed] on the record that this manufactured evidence constituted the basis of its verdict." (*Id.* at 37 (South, J., dissenting).) Finally, the Illinois appellate court rejected Owens's ineffective assistance of counsel claim on direct appeal. In the absence of the post-trial affidavit testimony mentioned above, the court concluded that Owens failed to point to anything in the trial record "which indicates that defense counsel failed to investigate the case" or "that defendant ever expressed a desire to testify or that defense counsel

frustrated defendant's request to testify." (*Id.* at 31-32 (majority opinion).)

*6 Owens filed a Petition for Leave to Appeal ("PLA") with the Illinois Supreme Court on January 8, 2003. (Lawrence Owens's Pet. for Leave to Appeal, Ex. E to Resp't's Answer.) Owens sought review only of the appellate court's conclusion that the evidence was sufficient for conviction and that the trial court's extrajudicial finding concerning Owens's motive was harmless error. (*Id.* at 1.) Petitioner also attempted to preserve other errors not raised in the PLA by stating that "several other instances of trial error were fully briefed in the Appellate Court, but space limitations here prevent discussion. If this Petition is granted, defendant wishes to preserve those issues which were presented as well in the appellate court, in a supplemental brief." (*Id.* at 3-4.) The Illinois Supreme Court denied Owens's PLA on April 2, 2003. *People v. Owens*, 203 I11.2d 563, 273 Ill.Dec. 142, 788 N.E.2d 733 (2003).

After his unsuccessful direct review concluded, Owens pursued further review by way of a petition for post-conviction relief.

Owens filed a *pro se* petition on September 10, 2003. (Pet. for Writ of Habeas Corpus (hereinafter "Habeas Pet."), at 3.)[2] A number of years later, counsel filed a supplemental petition for posconviction relief on Owens's behalf on June 16, 2008. Owens claimed that he was deprived of effective assistance of counsel because Rago, his trial counsel, neither investigated his alibi nor called alibi witnesses to testify at trial, and because Rago forbade Petitioner from testifying on his own behalf. (Supplemental Pet. for Post–

Conviction Relief, Ex. G to Resp't's Answer, at 1-2.)[3] In support of his petition, Owens submitted the post-trial affidavit testimony discussed above.

While his state postconviction petition was still pending, Owens filed the instant habeas petition on December 15, 2008. Respondent moved to dismiss the petition due to Petitioner's failure to exhaust his state court remedies. (Motion to Dismiss [18].) Owens cited "inordinate delay" to explain his decision to file a federal habeas petition before his state petition, then pending more than five years, had been resolved. (Habeas Pet. at 3.) This court initially delayed ruling on the motion to dismiss, in the hope that completion of the state court process would render Respondent's motion moot. On March 9, 2010, however, the court denied Respondent's motion, noting that despite Petitioner's diligence "in making contact with his lawyers, seeking information from them, and urging action," the state trial court had taken more than six years to rule on the petition, and no further ruling was in sight. (Mar. 9, 2010 Minute Order [24].) Although some of the delay was evidently attributable to his appointed counsel, this court noted that the state trial court was also responsible for delays, for reasons that appeared unrelated to any request made by Owens or his attorneys or by the state. (*Id.*)

During the pendency of this federal habeas petition, Petitioner's state postconviction petition continued to wind through the state courts. In its oral ruling, rendered on September 29, 2009, the state trial court explained that because Petitioner raised ineffective assistance of counsel claims on direct appeal, the postconviction petition claims were barred by *res judicata*. (Pet'r's Postconviction Appeal Brief, at 12;

Certified Report of Disposition in *People v. Owens*, No. 99 CR 25287-01, App. to Pet'r's Postconviction Appeal Brief, at A-7.) Petitioner appealed this decision to the Illinois appellate court, arguing that the trial court erred in dismissing his petition without an evidentiary hearing. (Pet'r's Postconviction Appeal Brief at 1.) Further, Petitioner asserted that the court erred in applying the doctrine of *res judicata* because Petitioner's state postconviction petition presented evidence outside the trial record, not available to the Illinois appellate court or the Illinois Supreme Court on direct appeal. (*Id.* at 27.)

*7 The Illinois appellate court denied Petitioner's appeal on March 21, 2011. (Summary Order in *People v. Owens*, No. 1— 09-2626 (Ill.App. 1st Dist. Mar. 21, 2011) (hereinafter "Postconviction Order"), Ex. M to Supplemental Record.) The court acknowledged that under Illinois law, *"[r]es judicata* does not bar a defendant from raising an ineffective assistance claim in a petition for postconviction relief if the claim is based on evidence outside the record." (*Id.* at 2 (citing *People v. Ward*, 187 Ill.2d 249, 257, 240 Ill.Dec. 636, 718 N.E.2d 117, 124 (1999)).) Nevertheless, the court concluded that the post-trial affidavits "do not constitute evidence outside the record sufficient to preclude the application of *res judicata* to this claim." (*Id.* at 3, 240 Ill.Dec. 636, 718 N.E.2d 117.) The court characterized counsel's decision not to investigate and present alibi witnesses, and instead to present no evidence in Owens's defense at all, as a "tactical choice made on the basis of strategic considerations." (*Id.* at 3, 240 Ill.Dec. 636, 718 N.E.2d 117.) Further, the court concluded that Petitioner had not alleged that he asserted his right to testify on his own behalf and that he had not established how absence of his

testimony prejudiced his defense. (*Id.* at 4, 240 Ill.Dec. 636, 718 N.E.2d 117.)

Following this appeal, Petitioner filed a Petition for Rehearing on March 31, 2011 (Ex. N to Supplemental Record), which the appellate court denied on June 22, 2011. (Ex. O to Supplemental Record.) Finally Petitioner filed a PLA with the Illinois Supreme Court. (Ex. P to Supplemental Index.) The PLA was denied on September 28, 2011. (Ex. Q to Supplemental Record.)

DISCUSSION

In his petition to this court, Owens claims that (1) the long delay in resolution of his state court postconviction petition violated his due process rights; (2) there was no probable cause to arrest him; (3) the trial court should have suppressed the photo array and lineup evidence because it was improperly suggestive; (4) the trial court made improper "extrajudicial" findings regarding Owens's motive, basing its finding of guilt on evidence not produced at trial; and (5) trial counsel provided ineffective assistance of counsel. In response, Respondent argues that an "inordinate delay" claim (Claim 1) is not cognizable on habeas review; that rejection of Owens's "extrajudicial findings" claim (Claim 4) was not an unreasonable application of, or contrary to, United States Supreme Court precedent; and that the remaining claims (Claims 2, 3, and 5) are procedurally defaulted. This court addresses the threshold issues raised in Respondent's answer-whether the claims are cognizable or procedurally defaulted-before considering the merits of those claims that are appropriately before this court.

I. Threshold Issues

A. Cognizability

Respondent is correct that the long delay in resolution of Owens's state postconviction petition does not support habeas relief. The object of habeas corpus relief "'is not to make whole someone who has suffered a loss,' but 'to determine whether a person is being confined in violation of basic norms of legality.'" *Jackson v. Duckworth,* 112 F.3d 878, 880 (7th Cir.1997) (quoting *Allen v. Duckworth,* 6 F.3d 458, 460 (7th Cir.1993)). Accordingly, "'delay in receiving a ruling on a discretionary state collateral appeal is not a ground for federal habeas corpus relief'" *Id.* (quoting *Montgomery v. Meloy,* 90 F.3d 1200, 1206 (7th Cir.1996)). Thus, habeas relief is denied on this claim (Claim 1).

B. Procedural Default

*8 Analysis of Respondent's procedural default argument is more complicated. Before seeking habeas review, a petitioner must exhaust available state remedies. 28 U.S.C. § 2254(b). Courts interpret this provision to require a petitioner to "'fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'" *Johnson v. Pollard,* 559 F.3d 746, 751 (7th Cir.2009) (alteration in original) (quoting *Duncan v. Henry,* 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995)). To fairly present his federal claim, a petitioner must put the claim through one complete round of the State's

established appellate review process. *Id.* at 752 (citing *Woodford v. Ngo*, 548 U.S. 81, 92, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006)). "Failure to do so precludes review by federal courts." *Id.*

Petitioner has not challenged Respondent's contention that Petitioner's challenge to probable cause for arrest (Claim 2) and to the identification procedures (Claim 3) were presented only to the Illinois appellate court, and were not explicitly argued in Petitioner's direct appeal PLA to the Illinois Supreme Court. Petitioner wisely does not argue that the "catch-all" language in his PLA, purporting to preserve errors not included due to space constraints, preserves these errors for habeas review. Those claims for habeas relief are procedurally defaulted.

Respondent also argues that Petitioner's ineffective assistance of counsel claims are procedurally defaulted. Respondent is correct that Petitioner did not raise these claims in his direct appeal PLA. Respondent filed his brief before the resolution of the postconviction petition, however. That petition did present his ineffective assistance claims, which Petitioner then raised in both the Illinois appellate court and the Illinois Supreme Court. Thus, the claims were subject to a full round of review.

Respondent argues that *res judicata,* under Illinois law, bars Petition from asserting these ineffective assistance claims. But the Seventh Circuit has "'repeatedly held that res judicata is not a bar to consideration of claims in a federal habeas action.'" *Davis v. Lambert,* 388 F.3d 1052, 1058 (7th Cir.2004) (quoting *Moore v. Bryant,* 295 F.3d 771, 776 n. 1 (7th Cir.2002)). In doing so, the Seventh Circuit has

concluded that a state court's determination on postconviction review that a petitioner's ineffective assistance claim is barred by *res judicata* is not an "adequate and independent state ground for rejecting the petition." *Id.* "'[F]ederal review is precluded only by procedural forfeitures, not by *res judicata* concerns." *Id.* (citing *Page v. Frank* 343 F.3d 901, 907 (7th Cir.2003)). Because Petitioner's ineffective assistance claims were fully and fairly presented through one complete round of state court review, they are not procedurally defaulted.

II. Merits Analysis

Two of the five claims survive to be decided on the merits: the claim that the court made improper "extrajudicial" findings regarding petitioner's motive and the ineffective assistance of counsel claims. Where the state courts deny a petitioner's federal claim on the merits, a federal court may grant habeas relief only where the state courts' decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Smith v. McKee,* 598 F.3d 374, 382 (7th Cir.2010). The Seventh Circuit has observed that a review for reasonableness "is highly deferential; indeed, 'a state decision may stand as long as it is objectively reasonable, even if the reviewing court determines it to be substantively incorrect.'" *Morgan v. Hardy,* 662 F.3d 790, 797 (7th Cir.2011) (quoting *Barrow v. Uchtman,* 398 F.3d 597, 602 (7th Cir.2005)); *see also Harding v. Sternes,* 380 F.3d 1034,

1043 (7th Cir.2004) ("A federal habeas court must find that the state's application of federal law was unreasonable and not simply erroneous or incorrect."). To be "objectively unreasonable," a state court's decision must fall "'well outside the boundaries of permissible differences of opinion.'" *Morgan,* 662 F.3d at 797 (quoting *Watson v. Anglin,* 560 F.3d 687, 690 (7th Cir.2009)). The petitioner bears the burden to show that the state courts' application of federal law was unreasonable. *Sturgeon v. Chandler,* 552 F.3d 604, 609 (7th Cir.2009) (citing 28 U.S.C. § 2254(e)(1); *Harding,* 380 F.3d at 1043). Where, however, the state court's adjudication of the claims was not on the merits, a federal habeas court reviews the claims *de novo. Cone v. Bell,* 556 U.S. 449, 472, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009).

A. Improper Extrajudicial Findings

*9 Petitioner claims he was deprived of a fair trial when, while announcing the verdict, the trial court judge made extrajudicial findings regarding Petitioner's motive to commit the murder. On direct appeal, the appellate court concluded that the judge's comments were not based on the evidence because there was "no evidence presented that [Owens] knew Nelson was dealing drugs, and there was no evidence presented that [Owens] was involved with gangs or the illegal drug trade." (Direct Appeal Order at 25.) Nevertheless, the majority of the appellate panel determined that the trial court's speculation as to Owens's motive for assaulting Nelson constituted harmless error because the eyewitness testimony was reliable enough to sustain the conviction.

Petitioner bears the burden to show that the state courts' decision violates the Constitution. Petitioner has asserted that he was denied a fair trial because the judge's extrajudicial findings were based on his personal opinion, bias, or prejudice. (Habeas Pet. at 7.) Beyond this initial assertion, however, the Petitioner does little to advance this line of argument. In Petitioner's *pro se* reply brief, he asserts that the extrajudicial findings were "racist." (Pet'r's Pro-Se Habeas Corpus Reply Pet. [52], at 3.) Later, in a brief prepared by counsel, Petitioner does not even address the trial court's extrajudicial findings, and instead focuses on his ineffective assistance of counsel claim. Thus, Petitioner has not identified any Supreme Court precedent that the Appellate Court allegedly applied in an unreasonable or contrary way. Petitioner's failure to carry his burden is, alone, enough reason to deny habeas relief on his "extrajudicial findings" claim.

Even if Plaintiff could establish that extrajudicial findings by a state court judge violated a clearly established Supreme Court precedent, the relevant inquiry is whether the appellate court's determination that the extrajudicial findings were harmless error was a reasonable application of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *See Johnson v. Acevedo,* 572 F.3d 398, 404 (7th Cir.2009) (explaining that where a state court conducted a harmless error analysis, the question for federal courts is whether it was a reasonable application of *Chapman*). Under *Chapman,* in order for a constitutional error to be considered harmless, it must be considered harmless beyond a reasonable doubt. *Chapman,* 386 U.S. at 24.

The appellate court's harmless error analysis was not an unreasonable application of *Chapman*. In discussing the evidence, the Appellate Court reviewed the testimony of the two eyewitnesses in detail. The Appellate Court thought it significant that a witness within a few feet of the attack had ample opportunity to observe the assailant. Additionally, although their testimony was not entirely consistent, each of the two witnesses positively put the Petitioner at the scene. With such evidence, it is not unreasonable for the appellate court to determine the error of motive speculation as harmless beyond a reasonable doubt. As the Petitioner made no substantive argument to further his claim, and the appellate court applied Supreme Court precedent in a reasonable manner, habeas relief on Count 4 is denied.

B. Ineffective Assistance of Counsel

*10 The court turns, finally, to the ineffective assistance claims. Petitioner claims trial counsel was ineffective in (1) failing to investigate, interview, or call alibi witnesses to testify and (2) failing to put Petitioner on the stand at trial. 4 "'[T]he right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). To establish a claim under *Strickland*, Petitioner must show he received deficient assistance, and that this deficiency resulted in prejudice. *Morgan*, 662 F.3d at 802.

Deficiency is established where the attorney's performance falls below "an objective standard of reasonableness." *Id.* (citing *Strickland*, 466 U.S. at

688). Review of an attorney's performance is "highly deferential and reflects a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.... So long as an attorney articulates a strategic reason for a decision that was sound at the time it was made, the decision generally cannot support a claim of ineffective assistance of counsel." *Yu Tian Li v. United States,* 648 F.3d 524, 527-28 (7th Cir.2011).

To establish prejudice, Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Morgan,* 662 F.3d at 802 (citing *Strickland,* 466 U.S. at 694). The error must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* (citing *Strickland,* 466 U.S. at 687). "The likelihood of a different result must be substantial, not just conceivable." *Id.* Further, there is no need to consider the performance prong of the *Strickland* analysis if the court finds the prejudice prong cannot be satisfied. *Id.* (citing *Matheney v. Anderson,* 253 F.3d 1025, 1042 (7th Cir.2001)).

This case presents complications in determining the appropriate level of deference toward the state court's adjudication of Petitioner's ineffective assistance claims. Where a federal habeas court reviews a state court's adjudication of a petitioner's ineffective assistance claim on the merits, 28 U.S.C. § 2265(d) applies and the question is whether "whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter, U.S.,* —

U.S. —, —, 131 S.Ct. 770, 785, 178 L.Ed.2d 624 (2011). When AEDPA's "highly deferential" standard for review of a state court's application of federal law applies in tandem with *Strickland'* s "highly deferential" standard for an attorney's performance, "review is 'doubly' so." *Id.* at 788 (quoting *Knowles v. Mirzayance,* 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009)). Thus, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

*11 In this case, however, the state courts did not directly resolve the ineffective assistance argument on the merits, instead denying the postconviction petition on *res judicata* grounds. Although *res judicata* implies that the merits of the issue had already been decided, Petitioner's postconviction petition included factual assertions outside the trial record that could not have been part of his claims on direct appeal, a fact that the Illinois appellate court itself acknowledged. At no point during the state court postconviction proceedings did the state courts conduct an evidentiary hearing to evaluate the merits of Petitioner's ineffective assistance claims. This court is inclined to take the state courts at their word: denial of the ineffective assistance claims in Petitioner's postconviction petition was based on *res judicata.* Furthermore, the Illinois appellate court never addressed *Strickland's* prejudice prong with regards to Owens's postconviction petition on the grounds that Rago did not *call* alibi witnesses to testify, and did not address Rago's alleged failure to *investigate* Owens's alibi at all. In similar cases, the Supreme Court has reviewed habeas petitions *de*

novo. See, e.g ., Rompilla v. Beard, 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (applying *de novo* review where the state courts did not address *Strickland'* s prejudice prong); *Wiggins v. Smith,* 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (same). As the court explains here, the state court's application of *Strickland* in its *res judicata* analysis appears inadequate under either standard of review.

1. Failure to Investigate or Call Alibi Witnesses

On appeal from denial of his post-conviction petition, the Illinois appellate court rejected Petitioner's claim that his trial counsel was ineffective for failing to call his alibi witnesses to testify. According to that court, the new evidence submitted by Petitioner was "not sufficient to preclude the application of *res judicata"* because Petitioner had failed to demonstrate that Rago's decision to call Blackman and Minor to present an alibi defense was anything other than sound trial strategy. The court observed that Rago had been informed of the alibi testimony prior to trial, but that he concluded that the testimony was unnecessary "after assessing the perceived weaknesses in the State's case." (Postconviction Order at 3.) Thus, the court concluded that Rago's decision to present no evidence in Petitioner's defense was a "tactical choice made on the basis of strategic considerations." *(Id.)*

Based on the uncontroverted evidence presented by Petitioner, however, this court cannot divine any reasonable argument that resting without presenting any evidence in Petitioner's defense is a sound alternative to presenting evidence that, if accepted by the trier of fact, would establish an absolute defense. This is not a situation where the presentation of

certain evidence might undermine other defense evidence, or where counsel believes one defense to be stronger than or inconsistent with another. Petitioner's alibi defense was compatible with, and in fact considerably bolstered, the perceived weaknesses in the prosecution's case due to the credibility problems with the only witness for the prosecution who claimed familiarity with the assailant from before the incident—Evans. *See Malone v. Walls,* 538 F.3d 744, 761 (7th Cir.2008) ("Especially when there are vulnerabilities in the prosecution's identification testimony, '[o]pposing testimony from other eyewitnesses ... give[s] the jury a qualitatively different and more powerful reason to believe that the State's witnesses [a]re mistaken in their identifications.'" (quoting *United States ex rel. Hampton v. Leibach,* 347 F.3d 219, 250 (7th Cir.2003))). Furthermore, the evidence does not support the conclusion that Rago made a strategic decision not to call alibi witnesses; according to the uncontroverted affidavit testimony submitted by Petitioner, Rago neither investigated Petitioner's alibi nor interviewed his alibi witnesses at all. Thus, it appears that Rago's decision not to call alibi witnesses was "one that occurred by default rather than design." *Hampton,* 347 F.3d at 249.

***12** The Illinois appellate court did not address the prejudice prong with regard to trial counsel's failure to call alibi witnesses, but the court concludes that it is easily satisfied here. There was a substantial likelihood that the presentation of a persuasive alibi defense would have altered the outcome at trial in a case where the only evidence against Petitioner was testimony from two eyewitnesses, one of whom-the only one who claimed previous familiarity with the

assailant-had "severe[ ]" credibility problems. *Cf. Malone,* 538 F.3d at 761 (holding unreasonable a state appellate court's determination that a petitioner was not prejudiced when his counsel failed to call a witness who would have rebutted the testimony of the prosecution's witness); *Hampton,* 347 F.3d at 253 ("Given the central role that eyewitness testimony played in this case, the vulnerabilities of the testimony of the State's eyewitnesses, and the shortcomings in human perception that so frequently render eyewitness testimony less reliable than other types of evidence, we are more than satisfied that the failure to investigate exculpatory eyewitnesses likely affected the outcome of [the petitioner's] trial." (citation omitted)).

Failure to *call* alibi witnesses was only one aspect of petitioner's ineffective assistance argument. The Illinois appellate court did not in any fashion address Petitioner's claim that his trial counsel failed to *investigate* the alibi defense or to interview the alibi witnesses. This failure affords an independent basis for an ineffective assistance of counsel claim.

> The duty to investigate derives from counsel's basic function, which is "to make the adversarial testing process work in the particular case." "Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, [the Supreme Court has] noted that counsel has a duty to make reasonable investigations or to

> make a reasonable decision that makes particular investigations unnecessary."

Hampton, 347 F.3d at 247 (alteration in original) (citations omitted) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)) (internal quotation marks omitted). If Petitioner's counsel did not investigate Petitioner's alibi, as Petitioner's unchallenged post-trial affidavits attest, Petitioner's defense was prejudiced for the same reasons described above with respect to Petitioner's failure-to-call-alibi-witnesses claim.

The court is nevertheless unwilling to assume that the affidavits Petitioner presents to substantiate his ineffective assistance claims are sufficient to support habeas relief without further investigation. One of those affidavits is from Petitioner himself, and another from his mother. Although the other affiants do not have the same obvious motive to fabricate evidence, their exculpatory assertions have never been subject to cross-examination. Additionally, the record contains no testimony from Petitioner's trial counsel either affirming or denying Petitioner's factual assertions about counsel's performance. An evidentiary hearing is necessary to give both Petitioner and the State an opportunity to develop evidence concerning his trial attorney's performance.

***13** In reaching this conclusion, the court recognizes the limitations imposed by AEDPA on a federal habeas court's authority. If, under § 2254(d), a federal court is limited to reviewing a state court's "adjudication on the merits," recent Supreme Court precedent would preclude this court from holding an evidentiary hearing. *See Cullen v. Pinholster*, — *U.S.*

—, —, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) ("review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits"). As noted above, however, the state court here rested its determination of the ineffective assistance claim on *res judicata* grounds, and did not decide the claim on its merits. At a minimum, it is clear that state courts did not address Petitioner's failure-to-investigate claim and did not address the prejudice prong for Petitioner's failure-to-call-alibi-witnesses claim, and therefore did not adjudicate those claims on the merits.

Even outside of § 2254(d), AEDPA generally bars federal courts from holding evidentiary hearings to supplement the record. 28 U.S.C. § 2254(e)(2). Where, however, "the ' fail[ure] to develop the factual basis of a claim in State court proceedings' can not be attributed to something the petitioner 'did or omitted,' Section 2254(e)(2) does not apply and it is then necessary to evaluate the request for an evidentiary hearing under pre-AEDPA standards." *Matheney*, 253 F.3d at 1039 (alteration in original). "Under pre-AEDPA standards, a federal evidentiary hearing is required if (1) a habeas petitioner alleges facts which, if proved, would entitle him to relief and (2) the state courts—for reasons beyond the control of the petitioner—never considered the claim in a full and fair hearing." *Id.* (citing *Porter v. Gramley*, 112 F.3d 1308, 1317 (7th Cir.1997)).

The court is satisfied that Petitioner meets these requirements. Trial counsel's failure to interview or call alibi witnesses did not appear on the face of the trial court record, and direct appeal was limited to review of that record—a principle that Petitioner's

appellate counsel mentioned in the brief on direct appeal. Petitioner's requests for a evidentiary hearing on state postconviction review were denied even though Petitioner diligently came forward with affidavit testimony that, if true, would establish that trial counsel failed to provide effective assistance. Because the facts concerning his attorney's performance are undeveloped, the state courts never had the opportunity to consider Petitioner's ineffective assistance of counsel claims in a "full and fair hearing." Under circumstances similar to these, the Seventh Circuit vacated a district court's order denying habeas relief and remanded for an evidentiary hearing. *See, e.g., Davis,* 388 F.3d at 1058-67 (concluding that a petitioner was entitled to an evidentiary hearing where the Illinois appellate court dismissed the petitioner's *Strickland* claim on *res judicata* grounds without conducting an evidentiary hearing). The court concludes Petitioner is entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to investigate Petitioner's alibi and for failing to call alibi witnesses.

2. Petitioner's Right to Testify

*14 On postconviction appeal, the Illinois appellate court also rejected Petitioner's ineffective assistance claim predicated on his trial counsel's refusal to let Petitioner testify on his own behalf. The court cited *People v. Barkes,* 399 Ill.App.3d 980, 989, 340 Ill.Dec. 383, 928 N.E.2d 102, 112 (2d Dist.2010), for the proposition that Petitioner was required to assert his right at trial, which Petitioner did not do. Under Illinois law, a criminal defendant's "conviction cannot be reversed on the basis that he was prevented from exercising that right unless he contemporaneously

asserted his right to testify by informing the trial court that he wished to do so." *People v. Smith,* 176 Ill.2d 217, 234, 223 Ill.Dec. 558, 680 N.E.2d 291, 302 (1997); *see also Thompson v. Battaglia,* 458 F.3d 614, 619 (7th Cir.2006) (recognizing Illinois as among the jurisdictions that require "a defendant to protest a lawyer's refusal to allow her to testify during trial to preserve the right"). The court also noted that Petitioner's affidavit did not indicate "how or when defendant informed counsel of his alleged desire to testify." (Postconviction Order at 4.) Additionally, the Illinois appellate court concluded that Petitioner had failed to explain how the absence of his testimony prejudiced his defense.

Under clearly establish Supreme Court precedent, "[a] criminal defendant's right to testify is 'a fundamental constitutional right.'" *Thompson,* 458 F.3d at 619 (quoting *Rock v. Arkansas,* 483 U.S. 44, 53 n. 10, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). Although a criminal defendant may waive that right, Petitioner contends that his trial counsel forbade him from testifying, and that neither his trial counsel nor the judge explained that the decision to testify was his alone. In his sworn affidavits, Petitioner asserts that had he been allowed to testify, he would have asserted his "actual innocence" and explained that he had an alibi defense.[5] Had he so testified, there is at least a reasonable probability that his alibi defense would have altered the outcome at trial; as noted above, the eyewitness testimony that provided the sole evidence against Petitioner was not overwhelming. In the absence of testimony from alibi witnesses, Petitioner's testimony on his own behalf would have been the only opportunity the court had to hear Petitioner's alibi defense. This court concludes that the Illinois

appellate court's conclusion that Petitioner did not explain how absence of his testimony prejudiced him appears to be an unreasonable determination of the facts and an unreasonable application of *Strickland*.

Further, Petitioner appears to have adequately pleaded facts sufficient to justify an evidentiary hearing on an ineffective assistance claim predicated on the denial of his right to testify. The Seventh Circuit has "steer[ed] a middle course" between courts, such those in Illinois, which require a criminal defendant to protest at trial counsel's refusal to allow the defendant to testify, and those jurisdictions that "require judges to inquire of defendants directly whether they want to testify." *Thompson*, 458 F.3d at 619. The Seventh Circuit requires "a defendant who wishes to raise this claim to meet a heightened pleading standard before the court must hold an evidentiary hearing on the question of waiver." *Id.* Under this heightened pleading standard, "a `barebones assertion by a defendant, albeit made under oath, is insufficient'; something more, such as an affidavit from the lawyer who allegedly forbade his client to testify, is required." *Id.* (quoting *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir.1991)). Petitioner does not present an affidavit from his trial counsel, but he does provide more than just his own sworn affidavit to substantiate his claim. Although the court notes the affiant's obvious conflict of interests, Petitioner presents sworn testimony from his mother, who appears to have participated in Petitioner's defense preparation. Ms. Owens testifies that she informed Petitioner's trial counsel several times that her son wanted to testify, but that at trial, counsel declined to present any evidence or to call his client to

the stand. Petitioner's claim is bolstered by Minor's and Blackman's affidavits, which suggest that counsel's performance was deficient in other respects. Even if Petitioner's evidence supporting his right-to-testify claim were not sufficient on its own to merit an evidentiary hearing, this claim obviously overlaps with the failure to-call-alibi-witnesses and failure-to-investigate claims. The court will conduct a single evidentiary hearing on all of Petitioner's ineffective assistance claims.

CONCLUSION

*15 For the reasons state above, the court will convene an evidentiary hearing of limited scope to determine (a) whether trial counsel failed to investigate Petitioner's alibi defense, interview his alibi witnesses, or call his alibi witnesses to testify; and (b) whether, and to what extent, Petitioner understood his right to testify. All other claims are denied. With resolution of a constitutional issue pending an evidentiary hearing, the court declines to issue a certificate of appealability at this time. Status conference is set for Thursday, May 10, 2012, at 9:30 a.m. for purposes of scheduling.

Footnotes

1. Owens has also asserted that Rago did not prepare Owens to testify before calling him as a witness at the hearing on his motion to quash the arrest. (Jan. 11, 2008 Owens Aff. ¶ 3, Ex. F to Pet'r's Reply.) Owens does not, however, advance this argument in his federal habeas petition.

2. No copy of this *pro se* petition appears in the record, but Respondent does not dispute that it was filed.

3. Petitioner's counsel later filed an amended supplemental petition in which Petitioner claimed, pursuant to the Illinois Post—Conviction Hearing Act, 725 ILCS 5/122-1(a)(1), and the due process clause of the Illinois Constitution, *see People v. Washington*, 171 I11.2d 475, 489, 216 Ill.Dec. 773, 665 N.E.2d 1330, 1337 (1996), that he was actual innocent based on newly discovered evidence. (Am. Supplemental Pet for Post—Conviction Relief, Ex. H to Resp't's Answer, at 1.) The trial court ultimately dismissed Owens's petition on this ground. (Brief and Argument for Petition—Appellant in *People v. Owens*, No. 1-09-2626 (hereinafter "Peres Postconviction Appeal Brief"), Ex. J to Supplemental Index of State Court Record Exhibits (hereinafter "Supplemental Record"), at 12.) It is not clear from the record on what grounds the trial court rejected Petitioner's actual innocence claim, but the court notes that the affidavits from Blackman and Minor do not constitute "newly discovered evidence" because the facts to which they attest were available to Petitioner at the time of his trial. Petitioner did not challenge the trial court's determination of his actual innocence claim on appeal.

4. Petitioner does not raise his trial counsel's failure to object to the photo array and lineup identifications as additional grounds for an ineffective assistance argument.

5. Petitioner's proposed testimony is distinguishable from the proposed testimony described in *Barkes*, the case cited by the Illinois appellate court in support of its conclusion on prejudice. In *Barkes*, a criminal defendant convicted of criminal sexual assault and aggravated criminal sexual abuse failed to establish prejudice where the "defendant did not indicate that had he been called to testify he

would have stated that he did not have sexual intercourse with [the victim] or that he was not in a position of trust, authority, or supervision over her, the central issues in the case." *Barkes*, 399 Ill.App.3d at 990, 980 N.E.2d at 113. Similarly, *Barkes* relied on a case in which the court found no prejudice where the defendant, accused of biting a police officer, "did not indicate that, if he had been called to testify, he would have stated that he had no altercation with the officer, that the officer's finger was injured before the altercation began, or that he did not bite the officer." *People v. Youngblood*, 389 Ill.App.3d 209, 218, 329 Ill.Dec. 522, 906 N.E.2d 720, 728 (2009) (2d Dist.2009). In this case, in contrast, Petitioner alleges that he would have testified that he was not even in the same city as Nelson at the time Nelson was murdered.

People v. Owens, 955 N.E.2d 477 (Table) (2011)
353 Ill.Dec. 10
955 N.E.2d 477 (Table)

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Illinois Dispositions of Petitions for Leave to Appeal".)

Supreme Court of Illinois

People
v.
Lawrence Owens

NO. 112668 |
SEPTEMBER TERM, 2011 | September 28, 2011

Lower Court: No. 1–09–2626

Opinion
Disposition: Denied.

Parallel Citations
955 N.E.2d 477 (Table)

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-09-2626

FIRST DIVISON
March 21, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Respondent-Appellee,	)	
v.	)	No. 99 CR 25287
LAWRENCE OWENS,	)	
Petitioner-Appellant.	)	Honorable Luciano Panici, Judge Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court. Justices Hoffman and Rochford concurred in the judgment.

SUMMARY ORDER

Defendant Lawrence Owens appeals from the second-stage dismissal of his amended petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2000)). Defendant contends the trial court erred in dismissing his petition without an evidentiary hearing where he made a substantial showing of ineffective assistance of trial counsel. Defendant claims trial counsel rendered ineffective assistance by failing to investigate or call two alibi witnesses to testify at trial and by depriving him of his constitutional right to testify on his own behalf.

The State counters that the trial court properly determined that the doctrine of *res judicata* precluded defendant from raising and relitigating these claims in his petition and therefore we should affirm dismissal of the petition. We agree with the State.

The doctrine of *res judicata* bars consideration of issues that were raised and decided on direct appeal. *People v. Harris*, 206 Ill. 2d 293, 299, 794 N.E.2d 181 (2002) ("any issues considered by the court on direct appeal are barred by the doctrine of *res judicata*, and issues which could have been raised on direct appeal are deemed waived"). The claims raised by defendant in his petition are the same ones raised and decided in his direct appeal.

Defendant attempts to avoid the bar of *res judicata* by presenting evidence outside the record. *Res judicata* does not bar a defendant from raising an ineffective assistance claim in a petition for postconviction relief if the claim is based on evidence outside the record. *People v. Ward*, 187 Ill. 2d 249, 257, 718 N.E.2d 117 (1999).

In regard to his ineffective assistance claim premised on trial counsel's alleged failure to investigate or call alibi witnesses, defendant attempts to avoid application of *res judicata* to this claim by presenting evidence outside the record in the form of affidavits by Timothy Blackman and Sheila Minor asserting that defendant was with them on the night of the offense. The affidavits of Blackman and Minor do not constitute evidence outside the record sufficient to preclude the application of *res judicata* to this claim.

Decisions concerning what witnesses to call are generally viewed as matters of trial strategy immune from claims of ineffective assistance of counsel. *People v. Munson*, 206 Ill. 2d 104, 139-40, 794 N.E.2d 155 (2002). In the instant case, defendant has failed to overcome the presumption that counsel's decision not to call Blackman and Minor was anything other than a tactical choice made on the basis of strategic considerations.

The affidavits of defendant and his mother, Bertha Marie Owens, indicate that trial counsel had been informed of the witnesses' alibi testimony prior to trial. The fact that counsel was aware of these witnesses' testimony before he made the decision not to call them, lends support to the inference that the decision was a matter of trial strategy rather than deficient performance. *See People v. Whittaker*, 199 Ill. App. 3d 621, 629, 557 N.E.2d 468 (1990).

Moreover, in her affidavit, Mrs. Owens attested that trial counsel told her that he planned to present an alibi defense but, after assessing the perceived weaknesses in the State's case, he "decided" otherwise when the State rested its case-in-chief. "Mistakes in trial strategy or tactics or in judgment do not of themselves render the representation incompetent." *People v. Stewart*, 104 Ill. 2d 463, 492, 473 N.E.2d 1227 (1984).

Finally, in regard to his ineffective assistance claim premised on trial counsel's alleged conduct in depriving him of his constitutional right to testify on his own behalf, defendant attempts to avoid application of *res judicata* to this claim by presenting evidence outside the record in the form of his own affidavit. Defendant avers that trial counsel "forbid" him from testifying on his own behalf and failed to explain to him his right to testify.

A defendant making a postconviction claim that trial counsel was ineffective for refusing to allow him to testify must allege that he asserted his right to testify. *People v. Barkes*, 399 Ill. App. 3d 980, 989, 928 N.E.2d 102 (2010). In addition, the defendant must show how the absence of his testimony prejudiced his defense. *Barkes*, 399 Ill. App. 3d at 989.

In this case, defendant's petition and affidavit contain no allegations that he made an assertion of his right to testify. In addition, there is no indication as to how or when defendant informed counsel of his alleged desire to testify. And finally, defendant fails to show how the absence of his testimony prejudiced his defense.

Accordingly, we find that the trial court properly dismissed defendant's amended petition for postconviction relief. This order is entered pursuant to Supreme Court Rule 23(c)(2), (4) (eff. Jan. 1, 2011).

Affirmed.

People v. Owens, 203111.2d 563 (2003)
788 N.E.2d 733 (Table)

273 Ill.Dec. 142
203 Ill.2d 563

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Illinois Dispositions of Petitions for Leave to Appeal".)

Supreme Court of Illinois

People
v.
Lawrence Owens

NO. 95534 | MARCH TERM, 2003 | April 02, 2003

Lower Court: No. 1-01-0341

Opinion
Disposition: Denied

Parallel Citations
203 I11.2d 563, 788 N.E.2d 733 (Table)

Third Division
December 4, 2002

No. 1-01-0341

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 99 CR 25287
LAWRENCE OWENS,	)	
Defendant-Appellant.	)	Honorable Joseph Macellaio, Judge Presiding.

ORDER

On November 8, 2000, following a bench trial, defendant Lawrence Owens, was found guilty of first-degree murder for beating Ramon Nelson to death with a baseball bat outside a lounge and liquor store in Markham, Illinois. On January 12, 2001, defendant was subsequently sentenced to 25 years' imprisonment in the Illinois Department of Corrections.

On appeal, defendant contends that: (1) the trial court erred in denying his motion to quash arrest; (2) the lineup evidence should have been suppressed as the fruits of an illegal arrest; (3) the trial court erred in failing to suppress the identification evidence on the ground that the photo-array and lineup were unnecessarily suggestive; (4) the trial court's extrajudicial findings regarding his alleged motive to commit the charged crime, indicate that he was denied a fair trial; (5) he was denied effective assistance of counsel; and (6) his 25-year sentence for first-degree murder was excessive. For the reasons that follow, we affirm.

Evidence was presented that on the evening of September 22, 1999, at approximately 8:30 p.m., outside the' entrance of a lounge and liquor store, defendant walked up to Nelson and beat him about the head with a baseball bat. Nelson died of the injuries he sustained in the beating.

In a hearing conducted on April 10, 2000, prior to defendant's bench trial, defendant unsuccessfully moved to quash his warrantless arrest on the ground of lack of probable cause. The following relevant facts were presented at the hearing.

Defendant testified that on October 26, 1999, he was driving down a street in Markham, Illinois, when he was arrested on a traffic violation. Defendant testified that the arresting police officer never indicated that he had a warrant for defendant's arrest. Defendant testified that after he was arrested, he was placed in a lineup; however, he was not fingerprinted, photographed or processed. Defendant testified that he has been held in custody ever since

his arrest on the traffic stop. He testified that the police officers who arrested him on the traffic stop never questioned him about Nelson's murder.

On cross-examination, defendant conceded that when he was arrested, he was driving a blue Topaz automobile, but he denied that he drove 50 miles an hour in a 20 mile an hour zone, and he denied that he sped through a stop sign without stopping. Defendant testified that as he was driving down the street, he did not see a squad car with its emergency lights activated until about 30 seconds before he stopped his car. Defendant then knew the police were trying to pull him over. Defendant testified that after he pulled his car over and exited the car, he walked away, but did not run. Defendant testified that he walked from Sussex through a passageway and over to the next block on Nottingham. Defendant was arrested after he informed police that he did not have a driver's licence. On redirect-examination, defendant testified that police officers never informed him that he was under arrest for murder.

Detective Terry White testified that he was assigned to the Nelson assault investigation on September 22, 1999. The detective testified that on September 28, 1999, six days after Nelson's assault and murder, he spoke with Maurice Johnnie and William Evans who both stated that they witnessed Nelson's beating. Johnnie described Nelson's attacker as a large black male, approximately 6'2" to 6'4", weighing about 220 to 240 pounds, dressed in brown. Evans described Nelson's attacker as a large black male, dressed in brown or tan. Detective White testified that Johnnie and Evans subsequently identified defendant in a photo-array as the individual

who attacked Nelson on the evening of September 22, 1999. The detective testified that based upon Johnnie and Evans' photo-array identifications, he informed his fellow officers to be on the look-out for defendant because defendant was wanted in connection with a murder investigation. On cross-examination, detective White acknowledged that no warrant was ever issued for defendant's arrest.

Arresting Officer Mike Alexander testified that on September 29, 1999, at roll call, detective White informed him that the defendant, also known as "Big O," was wanted in connection with a murder investigation. Officer Alexander testified that on the evening of October 26, 1999, at approximately 9:00 p.m., he arrested defendant for a traffic violation; specifically speeding and driving without a driver's license. The officer testified that he was in an unmarked squad car, when he saw a blue Mercury Topaz speed by, traveling 50 miles an hour in a 20 mile an hour zone. Officer Alexander testified that he activated his emergency lights and sirens, but the Topaz did not stop. Instead, the Topaz sped up and accelerated through a stop sign. The Topaz proceeded northbound on Kedzie and then eastbound on Sussex, where it eventually pulled over and stopped. Officer Alexander testified that defendant then exited the Topaz and ran northbound through a crosswalk. The officer testified that he exited his vehicle and gave chase on foot and eventually caught defendant when they both ran out of wind. The foot chase covered approximately a block and a half. Officer Alexander testified that he arrested defendant and transported him to the Markham police station when defendant could not produce a driver's license. Officer Alexander testified that when he and defendant reached the

police station, he notified detective White that defendant was in custody.

After both sides rested, defendant argued that if two credible eyewitnesses allegedly identified him as Nelson's attacker from a photo-array, then there should have been an arrest warrant issued so that a judge could have determined whether there was probable cause to arrest him. Defendant argued that there were no exigent circumstances excusing the obtaining of an arrest warrant.

The State responded that police officers had probable cause to arrest defendant on October 26, 1999, based on defendant's speeding through a residential neighborhood, driving through a stop sign without stopping and driving without a driver's license. In addition, the State claimed that police officers had probable cause to arrest defendant for Nelson's murder based on the photo-array identifications. After hearing arguments, the trial court denied defendant's motion to quash arrest, ruling that defendant's constitutional rights were not violated during the traffic arrest or at the Markham police station.

At trial, Johnnie testified[1] that on the evening of September 22, 1999, sometime after 8:00 p.m., he was seated in the front passenger seat of his own car, which was parked near the entrance doors to Mackie's lounge and liquor store located on 159th and Dixie Highway, in Markham, Illinois. Johnnie testified that his friend, Johnny Morgan was seated in the driver's

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[1] On October 29, 1999, Johnnie and Evans both testified before the grand jury regarding this matter.

seat and that a third individual was seated in the back seat. Johnnie testified that the third individual was Johnny Morgan's friend. Johnnie testified that his car was parked facing the lounge's front doors, approximately 10 feet away from the doors. The sun had gone down, but it was not dark yet, and the area in front of the lounge was illuminated by street lights and lights near the lounge's front doors.

The third individual exited the car and went into the liquor store. Johnnie testified that he and Johnny Morgan remained in his parked vehicle and waited for the third individual to return. Johnnie testified that as he and Johnny Morgan were sitting in his car talking, Nelson, who was on a bicycle, pulled up alongside the vehicle's driver side door and began speaking with Johnny Morgan. Johnnie testified that he did not know Nelson. Nelson spoke to Johnny Morgan for about three to five minutes and then rode his bike past the front of the car, onto the sidewalk and proceeded down the sidewalk to the right of Johnnie.

Johnnie testified that Nelson proceeded down the sidewalk on his bicycle and was about eight feet from the entrance of the lounge, when he attempted to turn around. Johnnie testified that he saw a man walking down the sidewalk approaching from his far right and toward Nelson as Nelson was attempting to turn his bicycle around. As Nelson was attempting to turn around, the man caught up with Nelson and started striking him on the head with a wooden stick or baseball bat type object. Johnnie testified that he saw Nelson get hit twice. After the first blow, Nelson, who was still on his bike, fell backwards into the doorway of the liquor store. And, as Nelson lay on the

ground, the man forcefully hit him a second time around the head area, with both hands on the bat. After the man hit Nelson a second time, he turned around and went back in the direction he came from.

Johnnie testified that he and Johnny Morgan then exited his vehicle and went over to look at Nelson. Nelson's head was swollen and he was unconscious and groaning. Johnnie testified that people began to gather around and suggested that he and Johnny Morgan take Nelson to the hospital. Johnnie agreed to take Nelson to the hospital after Johnny Morgan insisted that they do so.

Johnnie testified that about a week later, on September 28, 1999, at the police department's request, he went to the Markham police station where detective White showed him a photo-array. Johnnie testified that he identified defendant as the man who attacked Nelson on September 22, 1999. He also testified that about a month later, on October 27, 1999, he went to the Markham police station where he picked defendant out of a lineup, as the man who attacked Nelson on September 22, 1999.

On cross-examination, Johnnie acknowledged that on the night of the incident he did not speak to the police even though there was an officer present in the lounge when he and Johnny Morgan returned to the lounge from the hospital. Johnnie conceded that he did not talk to the police about the incident until September 28, 1999, when the police department requested that he come to the Markham police station. Johnnie testified that at the police station, he described Nelson's attacker as a male black, approximately 240 pounds and about 6'2." When

asked if that description could be characterized as "big and bulky," Johnnie replied that he would characterize it as "medium." When asked to look at the photograph of the lineup, Johnnie agreed with defense counsel that of the five individuals in the lineup, defendant was the "biggest and the bulkiest." In addition, Johnnie agreed that he did not pick defendant out of the lineup based upon height, because everyone in the lineup was seated.

On further cross-examination, Johnnie testified that just before Nelson came over to his car to speak with Johnny Morgan, Nelson had been standing with a crowd of about four or five individuals near the lounge. Nelson and Johnny Morgan spoke to each other for about three to five minutes. Johnnie testified that Nelson seemed to admire Johnny Morgan and complimented Morgan on driving the car.

Johnnie testified that on the evening of the incident, the lighting was good because the street lights were on and the area in front of the lounge was illuminated by lights coming from the lounge itself. Johnnie testified that the man who attacked Nelson, approached from the right and that the assailant's face was facing toward him during this approach. On redirect-examination, Johnnie testified that he got his best look at defendant after defendant had just finished striking Nelson and had turned to walk away.

The parties then stipulated that State's witness officer Alexander would testify consistent with his testimony heard on April 10, 2000, at the hearing on defendant's motion to quash arrest.

Detective White testified that on September 28, 1999, he interviewed Johnnie regarding the Nelson homicide. The detective testified that after he obtained Johnnie's description of the individual who assaulted and killed Nelson, he compiled a photo-array of six men based upon this description. Johnnie subsequently picked defendant's photo out of the photo-array and identified defendant as Nelson's assailant. Detective White testified that he never indicated to Johnnie that defendant's photo was in the photo-array and he never made any suggestive remarks regarding the photo-array.

The State then proffered the photo-array and asked detective White to identify the photo that Johnnie selected on September 28, 1999. Defendant objected to detective White testifying as to Johnnie's out-of-court identification of defendant from the photo-array, arguing that Johnnie had already testified and that the photo-array was not tendered to Johnnie when he testified regarding his identification of defendant in the photo-array. After hearing arguments on the matter, outside of detective White's presence, the trial court overruled defendant's objection. When detective White returned to the witness stand, he testified that Johnnie selected defendant's photo from the photo-array, as the photo of the individual who attacked Nelson.

Detective White testified that when he learned that defendant had been arrested on October 26, 1999, he immediately contacted Johnnie and Evans so that they could come down to the police station and view a five-man physical lineup. On October 27, 1999, Johnnie and Evans independently selected defendant out of the lineup. On cross-examination, detective

White acknowledged that defendant was the only individual who was in both the photo-array and physical lineup.

The next State's witness to testify was Evans. He testified that he was currently incarcerated in the Cook County Department of Corrections on a charge of possession of a controlled substance with intent to deliver. In addition, he testified that he was currently on probation regarding a charge of delivery of a controlled substance. Evans conceded that in exchange for his truthful testimony, the State agreed to recommend a sentence of probation on the charge of possession of a controlled substance with the intent to deliver and to recommend a recommitment of probation on the charge of delivery of a controlled substance.

Evans testified that on the evening of September 22, 1999, at approximately 8:00 p.m., he was on the northeast corner of the block on which Mackie's lounge is located, when he first saw Nelson, also known as Kermit. Evans knew Nelson from the neighborhood. Evans testified that it was just a little after dark, but it was not totally dark yet. In addition, the street lights were on and there were lights coming from the liquor store. Evans testified that he was able to see people's faces. Nelson was riding around the area on a small twenty-inch bicycle. Evans testified that he spoke with Nelson for about half an hour and then Nelson rode off toward the lounge's front entrance, where he stopped and sat on his bike near the lounge's front doors.

Evans testified that he saw two guys walk up to Nelson and engage him in a conversation. One of the

guys was defendant and he was carrying a baseball bat in his hand. Evans testified that he did not know defendant, but he recognized defendants' face since defendant had previously been in the liquor store. Evans testified that at this time, he was near a garbage can on the northeast corner of the block near Mackie's lounge and liquor store, getting ready to retrieve his bucket to wash a car, when he heard something that sounded like wood splitting. Evans testified that when he looked back, he saw defendant hitting Nelson with a baseball bat. Defendant hit Nelson twice on the head. Evans testified that he could not see how many hands defendant had on the bat when he struck Nelson, because defendant's back was turned toward him. Nelson was laying near the entrance to the liquor store and he was still on his bike. Evans testified that he hollered, "hey, what is going on," whereupon defendant and the second individual both ran north, past him.

The prosecutor then showed Evans the photo-array that Evans had viewed on September 28, 1999 at the police station, and asked him if he recognized it. When Evans replied in the affirmative, the prosecutor asked him to look at the photo array and pick out the number of the photo he selected at the police station. Evans twice picked number two. Defendant's photo is actually number four. Evans then testified that on October 27, 1999, he viewed a lineup. The prosecutor showed Evans a photograph of the lineup and asked him if he recognized it. When Evans replied in the affirmative, the prosecutor asked him to look at the photograph and pick out the number of the individual he selected at the police station. Evans picked number one. Defendant was number one in the lineup.

Evans testified that right after Nelson was beaten, he went over to see him. Nelson was laying in the middle of the door shaking and he could not talk. Evans help put Nelson into a car. Evans testified that the men in the car told him not to go anywhere and that they would be right back. When Evans was shown a photograph of the lounge and liquor store and asked if the photograph fairly depicted the way the lounge and liquor store looked on the night of the incident, Evans replied that it "was not that bright."

On cross-examination, Evans denied that he was involved with a gang. He also denied that Nelson was one of his associates, testifying that he knew Nelson only from around the neighborhood. Evans testified that he never saw a car parked in front of Mackie's lounge and liquor store and claimed that he did not see a car until he and other individuals were putting Nelson into the car. Evans testified that he first saw Nelson at the northern end of Mackie's, not the southern end. Evans also testified that the two individuals that confronted Nelson, approached from the north walking southbound. Evans testified that immediately after the incident, he briefly spoke with the police and told them what he had seen. He gave police the approximate heights of the two individuals that confronted Nelson and he informed the officers that he recognized one of the individuals from around the neighborhood. Evans testified that he did not give police a full physical description of the two individuals, because the police did not ask him for one. Evans acknowledged that in return for his truthful testimony, the State had agreed to recommend that his charge of possession with intent to deliver be reduced to simple possession and

recommend that he be readmitted to probation on his earlier charge of delivery of a controlled substance.

On redirect-examination, Evans acknowledged that before he was arrested for his second drug case for which he was presently incarcerated, he had already given grand jury testimony regarding Nelson's murder. Evans acknowledged that when he testified before the grand jury, he testified that on the evening of the incident, Nelson left him at the north corner and went to talk to some guys in a car. Evans testified that he told grand jurors that he barely saw Nelson because he going to get his bucket to go wash a car. He also testified that he told grand jurors that after he heard the sound of wood cracking and saw defendant hit Nelson with a bat, defendant and a second individual ran past him, running north down Dixie highway.

The parties then stipulated that if Dr. J. Lawrence Cogan, of the Cook County Medical Examiner's Office was called to testify, he would testify that Nelson died of head injuries he sustained in an assault and that the manner of death was homicide. The parties also stipulated that officer Lee Dean would testify that on September 22, 1999, at Ingalls Hospital, he recovered a clear plastic bag from the coat worn by Nelson, and that he recovered a plastic bag which contained forty smaller plastic bags each containing a white rocky substance, which tested positive for cocaine.

The parties further stipulated that on October 18, 2000, Evans and his attorney met with the assistant state's attorney for an interview regarding the trial testimony that Evans would be giving in this

case and to discuss a deal regarding his pending drug case before such interview would take place. The parties also stipulated that State's exhibit No. 14 was a true and correct copy of Evans' grand jury testimony; a transcript of this testimony was admitted into evidence. The State then rested. Upon denial of defendant's oral motion for a directed finding, defendant then rested without presenting evidence. After hearing closing arguments on the matter, the trial court stated:

> "I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who [defendant] knew he was a drug dealer. [Defendant] wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder."

Defendant was subsequently sentenced to 25 years' imprisonment in the Illinois Department of Corrections. He timely appealed.

ANALYSIS

Defendant concedes that the police had probable cause to arrest him on the traffic charges, but contends that the police lacked probable cause to arrest him on the homicide charge and thus argues that the trial court erred in denying his motion to quash arrest. A police officer must have probable cause to effect a valid warrantless arrest. *People v. Pearson,* 331 Ill. App. 3d 312, 316, 770 N.E.2d 1183 (2002). Probable cause to arrest exists when circumstances within the arresting officer's

knowledge are sufficient to warrant a man of reasonable caution to believe an offense has been committed and that it was committed by the individual arrested. *People v. Hoover,* 250 Ill. App. 3d 338, 620 N.E.2d 1152 (1993). Whether there is probable cause to justify an arrest depends upon the totality of the circumstances known to the officer at the time of the arrest, including the officer's factual knowledge and his or her prior law enforcement experience. *People v. Bell,* 96 Ill. App. 3d 857, 421 N.E.2d 1351 (1981); *People v. Earley,* 212 Ill. App. 3d 457, 570 N.E.2d 1235 (1991). Probable cause to arrest does not require the same degree of proof necessary to convict, but it requires more than a hunch or mere suspicion. *Bell,* 96 Ill. App. 3d at 869. The benchmark in a fourth amendment analysis is the reasonableness of the particular governmental intrusion, which depends on balancing the public interest in crime prevention against the individual's right to personal security free from arbitrary interference by police officers. *People v. Gonzalez,* 184 Ill. 2d 402, 704 N.E.2d 375 (1998).

Whether probable cause exists is usually a mixed question of law and fact, and a trial court's ruling will not be reversed unless it is manifestly erroneous. *In re D.G.,* 144 Ill. 2d 404, 581 N.E.2d 648 (1991). However, where, as here, neither the facts nor the credibility of the witnesses is contested, the determination of whether probable cause exists is a question of law subject to *de novo* review. *In re D.G.,* 144 Ill. 2d at 408-09.

In the present case, we find that under the totality of the circumstances, the police had probable cause to arrest defendant for Nelson's homicide and

therefore, the trial court did not err in denying defendant's motion to quash arrest. The record shows that on September 28, 1999, six days after Nelson was assaulted, Johnnie and Evans went to the Markham police station where they both independently viewed a photo-array and picked out defendant's photograph as the individual who assaulted Nelson. On September 29, 1999, at roll call, arresting officer Alexander received information from detective White that defendant was wanted for investigation in connection with a homicide. Approximately a month later, on October 26, 1999, Officer Alexander arrested defendant for speeding through a residential neighborhood, driving through a stop sign without stopping and driving without a driver's license. Defendant was then transported to the police station where, that same day, he was placed under arrest for Nelson's murder.

The record shows that defendant's initial warrantless arrest for the traffic violations was clearly based on probable cause. In addition, based on Johnnie and Evans' photo-array identifications, the police had probable cause to arrest and detain defendant for Nelson's homicide. See *People v. Pendleton,*104 Ill. App. 3d 1104, 1106-07, 433 N.E.2d 1076 (1982) (concluding that police had probable cause to hold defendant on a rape charge, where defendant, who was initially arrested on a traffic violation, was placed in a lineup and identified by the victim as the man who raped her). Therefore, we hold that the trial court's finding that the police had probable cause to arrest defendant for Nelson's homicide, was not manifestly erroneous and thus, the trial court did not err in denying defendant's motion to quash arrest.

Defendant next maintains that the lineup evidence should have been suppressed as the fruits of an illegal arrest. We must reject defendant's contention on this issue. Since there was probable cause for the initial warrantless traffic arrest, and probable cause for the arrest on the murder charge based on the photo-array identifications, the lineup identification which followed was not the fruit of an illegal arrest. *Pendleton*, 104 Ill. App. 3d at 1107-08.

Defendant next contends that the trial court erred in denying his motion to suppress the identification evidence because the photo-array and physical lineup were unnecessarily suggestive. The State responds that the trial court could not have erred in denying defendant's motion to suppress, because defendant never filed such a motion. The State also contends that defendant waived review of the propriety of the identification evidence introduced at trial, by failing to raise this issue in a trial objection and in a written post-trial motion.

Defendant has waived his right to argue that the photo-array and lineup procedures were suggestive. A defendant who does not move to suppress an identification waives the right to argue that the identification was the result of suggestive procedures. *People v. Pierce*, 52 Ill. 2d 7, 10, 284 N.E.2d 279 (1972); *People v. Campbell*, 115 Ill. App. 3d 631, 634, 450 N.E.2d 1318 (1983). Waiver aside, defendant's contentions on this issue must still fail.

Evidence of a witness' pretrial identifications of an accused must be excluded at trial, only where both the procedure was unnecessarily suggestive and there was a substantial likelihood of misidentification.

People v. Sykes, 161 Ill. App. 3d 623, 633, 515 N.E.2d 253 (1987); *People v. Hartzol*, 222 I11. App. 3d 631, 642, 584 N.E.2d 291 (1991). A defendant bears the burden of establishing that the pretrial procedures were unduly suggestive, and a court looks at the totality of the surrounding circumstances in making its determination on this issue. *Sykes*, 161 Ill. App. 3d at 633.

In the present case, defendant failed to meet his burden of establishing that the photo-array and lineup procedures were unnecessarily suggestive or that there was a substantial likelihood of misidentification. In regards to the photo-array, defendant asserts that the witnesses might well have selected his photograph out of the photo-array, because his photograph was proportionately much larger than the other photos and it appeared to be underexposed. Defendant's argument must be rejected because it has been determined that a photo-array is not impermissibly suggestive merely because a defendant's photograph is of a different format or a different size from the other photographs in the photo-array. See *People* v. *Collins*, 176 Ill. App. 3d 169, 175, 530 N.E.2d 1143 (1988).

In regards to the physical lineup, defendant contends that the lineup was problematical because he did not have counsel to observe the lineup proceedings, he was the largest male in the lineup, and he was the only individual who appeared in both the photo-array and physical lineup. All of defendant's contentions must be rejected.

First, it is well settled that a person's Sixth and Fourteenth amendment right to counsel attaches only

at or after the time adversary judicial proceedings have been initiated against him. See *People v. Garrett,* 179 111. 2d 239, 247, 688 N.E.2d 614 (1994). Such adversary proceedings may be initiated by way of a formal charge, preliminary hearing, indictment, information or arraignment. *Kirby v. Illinois,* 406 U.S. 682, 68889, 92 S. Ct. 1877, 1881-82, 32 L. Ed. 2d 411 (1972); *People v. Earl,* 78 Ill. App. 3d 188, 192, 397 N.E.2d 97 (1979). In the present case, the grand jury did not return its indictment against defendant until November 5, 1999, nine days after the lineup took place, therefore, defendant had no right to counsel during the lineup proceedings. Garrett, 179 Ill. 2d at 251.

Second, the physical lineup procedure was not unnecessarily suggestive merely because defendant was among the largest individuals in the lineup. Physical differences in size between an accused and other participants in a lineup does not make that lineup unduly suggestive, provided the differences are not too great. *People v. Harrison,* 57 Ill. App. 3d 9, 13, 372 N.E.2d 915 (1978). An examination of the photographic lineup in this case reveals that there is not a substantial disparity in physical size between defendant and the other participants in the lineup. Differences in the age, size, and appearance of a defendant and other participants in a lineup generally go to the weight of the evidence and not its admissibility. *People v. Maloney,* 201 Ill. App. 3d 599, 607, 558 N.E.2d 1277 (1990). And third, physical lineups are not rendered impermissibly suggestive merely because defendant was the only person in the lineup whose photograph was previously shown to a person viewing the lineup. *People v. Johnson,* 149 Ill. 2d 118, 148, 594 N.E.2d 253 (1992); *People v.Curtis,*

262 Iii. App. 3d 876, 883-84, 635 N.E.2d 860 (1994). Therefore, under the totality of the circumstances, defendant has failed to meet his burden of establishing that the photo-array and lineup procedures were unnecessarily suggestive or that there was a substantial likelihood of misidentification.

Defendant next contends that the eyewitness identification evidence against him was so untrustworthy, vague and incredible that it was insufficient to sustain his conviction for murder beyond a reasonable doubt. The State responds that the identification evidence supported the trial court's guilty verdict.

When a defendant challenges the sufficiency of the evidence, the relevant question is whether after viewing the evidence in the light most favorable to the prosecution, a rationale trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Gilliam,* 172 Ill. 2d 484, 515, 670 N.E.2d 606 (1996). A criminal conviction will not be set aside on review unless the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of defendant's guilt. *People v. Eyler,* 133 Ill. 2d 173, 191, 549 N.E.2d 268 (1989). In order to sustain a conviction, one of the elements that the prosecution must prove beyond a reasonable doubt is that the defendant was the perpetrator of the charged crime. *People v. Dante,* 35 Ill. 2d 538, 540, 221 N.E.2d 409 (1966); *People v. Daniels,* 331 Ill. App. 3d 380, 389-90, 770 N.E.2d 1143 (2002). The State can carry its burden of proving guilt through the testimony of a single, credible eyewitness, if the witness viewed the offender under circumstances permitting a positive identification. *People v. Smith,* 299 Ill. App. 3d 1056,

1061, 702 N.E.2d 218 (1998); *People v. McAfee,* 332 Ill. App. 3d 1091, 1096, 774 N.E.2d 469 (2002). Nonetheless, "'[e]yewitness testimony under the best of conditions is subject to all of the frailties of human perception.'" *People v. Hernandez,* 312 Ill. App. 3d 1032, 1037, 729 N.E.2d 65 (2000). And our supreme court has recognized that "'[o]f all the factors that account for the conviction of the innocent, the fallibility of eyewitness identification ranks at the top, far above all the others.'" See *People v. Gardner,* 35 Ill. 2d 564, 571, 221 N.E.2d 232 (1966).

The general rule is that a conviction cannot be sustained beyond a reasonable doubt by the evidence if the witness's identification of the defendant is vague, doubtful and uncertain. *People v.* Ash, 102 Ill. 2d 485, 494, 468 N.E.2d 1153 (1984); *People v. Cullotta,* 32 Ill. 2d 502, 504, 207 N.E.2d 444 (1965). The United States Supreme Court in *Neil v. Biggers,* 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972), set forth five factors to be considered in evaluating the reliability of an eyewitness identification: (1) the opportunity the witness had to view the offender at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. Illinois courts use the same five-factor test in determining whether the identity of the accused has been proven beyond a reasonable doubt. See *People* v. *Slim,* 127 Ill. 2d 302, 307-08, 537 N.E.2d 317 (1989).

In a bench trial, the trial judge determines the reliability of an eyewitness' identification testimony. *Smith,* 299 Ill. App. 3d at 1061-62. In the State's closing argument, the prosecutor stated, that this case "boils down to identification." However, here, there is no indication whether or not the trial judge assessed the credibility of the eyewitnesses, resolved conflicts in their testimony, or weighed the evidence or drew reasonable inferences therefrom. After hearing all the evidence and closing arguments, the trial judge remarked:

"I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who [defendant] knew he was a drug dealer. [Defendant] wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder." Nevertheless, despite the trial judge's comments, in a bench trial, it is presumed that the trial judge considered only competent evidence in reaching his verdict. *People v. Worlds,* 80 Ill. App. 3d 628, 631, 400 N.E.2d 85 (1980).

The State attempts to justify the trial judge's comments by arguing that the comments were based upon the evidence. Specifically, the State contends that the trial judge could have reasonably concluded that the murder involved a dispute over illegal drugs since prior to the attack, Nelson was seen approaching vehicles in a liquor store parking lot, presumably to solicit drug sales, and after the attack Nelson was found with 40 bags of crack cocaine in his coat pocket. In addition, at oral argument, the State argued that the trial judge could have inferred that Nelson's homicide was the result of a dispute over

illegal drugs based on the "style" of the assault and murder, which the State contended was akin to an execution. However, there was no evidence presented that defendant knew Nelson was dealing drugs, and there was no evidence presented that defendant was involved with gangs or the illegal drug trade. The State further argues that even if this court determines that the trial judge's comments were improper, the comments should be deemed harmless since there is no indication that the comments constituted a material factor in defendant's conviction.

In the present case, defendant's conviction rests upon the eyewitness testimony of Johnnie and Evans, each of whom separately identified defendant as Nelson's assailant. It is true that Johnnie and Evans contradict each other on some points regarding the event,[2] and the reliability of Evans' testimony is severely called into question.[3] Nevertheless, Johnnie's

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[2] Evans testified that two men approached Nelson, one of whom beat Nelson with a bat and afterwards both men ran away from the scene. Johnnie testified, however, that Nelson was approached by only one individual who beat him, and afterwards this individual walked away from the scene.

[3] Evans' testimony was weakened by the fact that at trial he twice misidentified defendant's photograph in the photo-array, even though he testified that he recognized defendant from the neighborhood. Moreover, Evans' testimony was further weakened by the fact that during the trial he was in custody, and in exchange for his trial testimony the State agreed to recommend a sentence of probation on a pending drug charge and to recommend a recommitment of probation on an old drug charge. See *People v. Anthony Roy W.*, 324 Ill. App. 3d 181, 187, 754 N.E.2d 866 (2001) (stating that evidence that witness has pending charges or is in State custody is relevant to the witness's credibility as it tends to show the testimony may be influenced by bias, interest or motive to lie).

identification testimony is reliable and sufficient enough to support the trial court's guilty verdict. A single witness' identification of the accused is sufficient to sustain a conviction, if the witness had ample opportunity to observe the accused under circumstances permitting a positive identification. *People v. Denton,* 329 Ill. App. 3d 246, 251, 767 N.E.2d 879 (2002). Moreover, despite the contradictions between their testimony, both Johnnie and Evans put defendant at the scene of the crime and both identify defendant as Nelson's assailant. There is no evidence that Johnnie and Evans knew each other or had any reason to conspire and fabricate their testimony. Therefore, in light of these identifications, the trial court's speculation as to defendant's motive for assaulting Nelson, will be construed as harmless error. That being said, we remind the trial court that in a case such as this, where there is no physical evidence linking defendant to the crime and the identity of the perpetrator of the charged crime is at issue and defendant's conviction rests upon eyewitness identification testimony -- every effort should be made to assess the credibility of the eyewitnesses, resolve any conflicts in their testimony, weigh the evidence and draw reasonable inferences therefrom.

In the present case, in regard to Johnnie's eyewitness testimony as it related to the five *Biggers* identification factors, the evidence indicated that his testimony was reliable. For example, the evidence indicated that Johnnie had an adequate opportunity to view defendant during the attack on Nelson. Johnnie testified that the incident occurred just a few feet away from where he sat in his car. He testified that the area in front of the liquor store where the

attack occurred was well-lit, and that he saw defendant's face just before the attack occurred and after defendant turned to leave.

The evidence indicated that Johnnie's degree of attention was high. Johnnie testified that Nelson had just spoken to Johnny Morgan who was also sitting in the car and he described how Nelson rode off and attempted to turn his bicycle around just before defendant caught-up with Nelson and beat him with the bat. The evidence revealed that Johnnie's prior description of defendant was generally accurate. Johnnie testified that he told detective White that defendant was a large black male, approximately 6'2" to 6'4," weighing about 220 to 240 pounds, dressed in brown. At the hearing on defendant's motion to quash his arrest, he admitted that he is approximately 6'2" and that on the date of his arrest, he weighed about 235 pounds. In addition, Johnnie's testimony that defendant was dressed in brown on the date of the occurrence, is corroborated by Evans' testimony that defendant was a large black male, dressed in brown or tan.

The evidence indicated that Johnnie expressed a high level of certainty at the identification confrontation. At trial, he identified defendant as the individual who assaulted Nelson on September 22, 1999. And unlike Evans, at trial, Johnnie did not misidentify defendant's photograph in the photo-array.

The length of time between the assault and Johnnie's confrontation identification was only six days. Johnnie testified that on September 28, 1999, six days after Nelson was assaulted, he went to the

Markham police station where he identified defendant in a photo-array as the individual who attacked Nelson on September 22, 1999. In addition, Johnnie testified that on October 27, 1999, a day after defendant was arrested on the traffic violation, he went to the police station where he identified defendant in a physical lineup as the individual who attacked Nelson on September 22, 1999. Even though there is no time limit beyond which an identification will cease to be reliable, a substantial length of time between the occurrence and the witness' identification diminishes the reliability of the identification. See People v. Barney, 60 Ill. App. 2d 79, 80-81, 208 N.E.2d 378 (1965) (pointing out six month lapse between the occurrence and the witness's identification); *People v. Reese,* 14 Ill. App. 3d 1049, 1053, 303 N.E.2d 814 (1973) (noting two month lapse between the incident and the identification); *People v. Ford,* 195 Ill. App. 3d 673, 677, 553 N.E.2d 33 (1990) (noting one year separation between undercover narcotics buy and identification, and defendant's arrest). Considering the totality of the circumstances, Johnnie's identification of defendant was reliable.

Defendant also contends that he was denied effective assistance of counsel. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the assistance of counsel. U.S. Const., amend. VI. This amendment requires not only that a person accused of a crime have the assistance of counsel for his or her defense, but also that such assistance be "effective." *United States v. Cronic,* 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). A two-pronged test for determining an ineffective assistance of counsel claim was established in. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984), and followed by Illinois in *People v. Albanese,* 104 Ill. 2d 504, 473 N.E.2d 1246 (1984). In order for a defendant to obtain a reversal of a conviction based on an ineffective assistance of counsel claim, the defendant must show that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant, that there is a reasonable probability that, absent the errors, the outcome would have been different. *People v. White,* 322 Ill. App. 3d 982, 985, 751 N.E.2d 594 (2001).

The "benchmark" in determining whether there has been ineffectiveness of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 696, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. A reviewing court must evaluate counsel's performance from counsel's perspective considering the circumstances at the time of trial, without the distorting effects of hindsight, and defendant must overcome the strong presumption that challenged action might be considered sound trial strategy. *People v. Garza,* 180 Ill. App. 3d 263, 268, 535 N.E.2d 968 (1989).

Defendant contends that he was denied effective assistance of counsel on the grounds that defense counsel failed to move for the suppression of the identification evidence, failed to investigate the case or call witnesses favorable to the defense, and failed to call him to testify on his own behalf. We must reject each of defendant's contentions.

In order to establish that trial counsel was ineffective for failing to file a motion to suppress evidence, the defendant must show that a reasonable probability exists that both the motion would have been granted and that the outcome of the trial would have been different if the evidence had been suppressed. *People v. Robinson,* 299 Ill. App. 3d 426, 434, 701 N.E.2d 231 (1998); *People v. Orange,* 168 Ill. 2d 138, 153-54, 659 N.E.2d 935 (1995). As previously noted, the record indicates that no factual bases existed to suppress the identification evidence obtained in the photo-array or physical lineup. Therefore, defense counsel's failure to file a motion to suppress was not prejudicial to defendant.

To prevail on a claim of ineffective assistance of counsel based on the failure to investigate, a defendant must show that substantial prejudice resulted and that the outcome of the trial would have been different had counsel properly investigated. *Orange,* 168 Ill. 2d at 151. Defendant points to nothing in the record which indicates that defense counsel failed to investigate this case. Consequently, defendant's contention that defense counsel was ineffective for failing to investigate this case is without basis.

Finally, defendant contends that defense counsel was ineffective for failing to call him to testify on his own behalf. The State responds that defendant's contention should be rejected because decisions regarding which witnesses to call at trial and what evidence to present, are matters of trial strategy. The State is incorrect regarding its strategy argument, because a criminal defendant's right to testify at trial is a fundamental right, which is

generally not a matter of trial strategy. See *People v. Steward*, 295 Ill. App. 3d 735, 743, 693 N.E.2d 436 (1998). Nonetheless, defendant's contention on this issue must be rejected. There is no indication in the record showing that defendant ever expressed a desire to testify or that defense counsel frustrated defendant's request to testify.

Finally, defendant contends that his 25-year sentence for first-degree murder is excessive and shows that the trial court failed to consider his rehabilitative potential, in light of his lack of prior convictions, educational background, and employment record. Defendant has waived this argument for review because he did not include the sentencing issue in his post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988). Waver aside, under the facts in this case, a reduction in defendant's sentence would be unwarranted.

Imposition of a sentence is a matter of judicial discretion that will not be disturbed absent an abuse of that discretion. *People v. Perruquet*, 68 Ill. 2d 149, 153, 368 N.E.2d 882 (1977). In addition, where a defendant's sentence is within statutory limits, a reviewing court will not alter the sentence absent an abuse of discretion. *People v. Cabrera*, 116 Ill. 2d 474, 494, 508 N.E.2d 708 (1987). Moreover, in determining an appropriate sentence, the nature of the crime, the protection of the public, deterrence and punishment are all relevant as well as defendant's potential for rehabilitation. *People v. Trimble*, 220 Ill. App. 3d 338, 355, 580 N.E.2d 1209 (1991).

In the instant case, defendant's sentence was within the applicable statutory range. Defendant was

sentenced to 25 years' imprisonment for first-degree murder. The statutory range for first-degree murder is 20 to 60 years' imprisonment. 730 ILCS 5/5-8-1(a)(1) (West 1996). Thus, defendant's sentence is 5 years above the minimum for his crime. Where an imposed sentenced is within the statutory range, it will not be found excessive unless there is an affirmative showing that the sentence varies greatly from the spirit and purpose of the law or manifestly violates constitutional guidelines; the spirit and purpose of the law are promoted when a sentence reflects the seriousness of the crime and gives adequate consideration to defendant's rehabilitative potential. *People v. BoClair,* 225 Ill. App. 3d 331, 335, 587 N.E.2d 1221 (1992).

In the present case, there is nothing in the record which indicates that the trial judge ignored defendant's rehabilitative potential or any mitigating factors before he imposed his sentence. The record indicates that at defendant's sentencing, the trial judge acknowledged the presentence investigation report, which raises the presumption that the trial court took into account defendant's potential for rehabilitation. *People v. Wilburn,* 263 Ill. App. 3d 170, 185, 635 N.E.2d 877 (1994). Immediately prior to imposing sentence, the trial judge acknowledged that for an individual without a history of criminal behavior, prison would not be an easy place to live. But the trial judge went on to state that based on the severity of the assault and on the victim's young age, a 25-year sentence of imprisonment was warranted. The record shows that the trial judge considered both mitigating and aggravating factors and arrived at a balance between society's need for protection and defendant's rehabilitative potential.

Accordingly, for the reasons set forth above, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

HALL, J., with WOLFSON, J., concurring.

Presiding Justice South, dissenting:

Respectfully, I must dissent. While I agree with the majority that the motion to suppress was properly denied, I disagree with its conclusion that the trial court's statement regarding defendant's "motive" in committing the crime was harmless error.

It is axiomatic that in a bench trial, it is for the trial judge to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Slim*, 127 Ill. 2d 302 (1989). Admittedly, we do have the testimony of two eyewitnesses. However, the majority glosses over the very troubling fact that Evans identified the wrong photograph at trial, even after repeated attempts by the prosecutor to correct the error. What's more troubling about his testimony is that he is the one witness who claimed he had seen defendant on a number of occasions in the liquor store and knew him by sight. His misidentification was never corrected. Therefore, I find his testimony to be doubtful and highly suspect, especially in light of the fact that he had entered into an agreement with the prosecutor to be re-committed to probation on a drug delivery charge in exchange for his testimony.

Maurice Johnnie testified that he saw the beating from a few feet away and observed the assailant under very stressful circumstances within a brief time span. I might be persuaded, however, that his single identification would be sufficient to convict if it were not for the fact that the court never stated that he relied on that identification or other properly admitted evidence.

Instead, the record affirmatively demonstrates that the court reached its verdict solely based upon defendant's purported motive. When a judge sits as the trier of fact in a bench trial, the judge is presumed to have considered only competent evidence presented by the parties at trial. See *People v. Gilbert*, 68 Ill. 2d 252, 258, 369 N.E.2d 849 (1977); *Buckner v. Causey*, 311 Ill. App. 3d 139, 145 (1999); *Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 Ill. App. 3d 590 (2000).

The presumption that the trial court considered competent evidence is rebutted only when it affirmatively appears that: (1) the court considered inadmissible evidence; and (2) that the court was misled or improperly influenced thereby. *People v. Barnes*, 48 Ill. App. 3d 226, 229 (1977). In the instant case that presumption has been clearly and undeniably rebutted. Even the majority cannot deny that the trial court considered matters outside the trial record. The trial court stated that all of the witnesses "skirted the real issue" which was that the victim was "a drug dealer," and that defendant wanted to "knock him off," even though not one scintilla of evidence was presented that the victim was selling drugs at the time of the murder or that defendant knew he was a drug dealer and wanted to "knock him off." What we do have is a trial court

manufacturing, supplying, and interjecting its own evidence into a trial and then affirmatively stating on the record that this manufactured evidence constituted the basis of its verdict. I fail to comprehend how such conduct can be regarded as "harmless error."

Because the eyewitness identification was marginal at best and because the court said that it only considered unsupported insinuations without any indication that he was aware of this impropriety, it is my opinion that justice and fundamental fairness demand that defendant be afforded a new trial free from such prejudice. See *People v. Nuccio*, 43 Ill. 2d 375 (1969).

Supreme Court, U.S.
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No. 14-1516

IN THE
Supreme Court of the United States

STEPHEN DUNCAN, Warden
Petitioner,

v.

LAWRENCE OWENS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT LAWRENCE OWENS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit correctly granted relief under 28 U.S.C. § 2254, having determined: that the Illinois state trial court expressly convicted Respondent based on supposed "facts" not supported by any evidence presented at trial; and that the trial court's error was not harmless.

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INTRODUCTION

There are no grounds for this Court to grant certiorari to review the Seventh Circuit's highly fact-specific, and in any event correct, grant of relief under 28 U.S.C. § 2254. Petitioner does not contend that the Seventh Circuit's decision conflicts with decisions of other Circuits. Nor does Petitioner contend that the Seventh Circuit decided an important issue of federal law. Moreover, Petitioner does not seriously contest the existence of a clearly established point of law, in this case that it would be unconstitutional for a trial court to convict a defendant based on anything other than the evidence introduced at trial. Rather, apparently misunderstanding the holdings of the state trial court and the Seventh Circuit, Petitioner asks this Court to engage in a highly fact-specific analysis of certain events that took place during Respondent's trial in November 2000.

This Court has repeatedly emphasized that it does not engage in error correction, particularly where, as here, determining whether an error exists requires mining a fifteen-year-old trial transcript to determine the meaning of certain words uttered by a trial judge when explaining his verdict. Further, were this Court to engage in this analysis it would then need to engage in a second, highly fact-specific determination of whether certain eyewitness testimony presented at trial was sufficiently strong that any constitutional error committed by the trial court should be dismissed as harmless.

Moreover in repeated applications before this Court seeking a stay of the mandate, Petitioner suggested that the failure to grant a stay might moot its petition entirely should the Illinois courts vacate Respondent's conviction. This Court has now denied all of those applications and the Illinois state trial court has now vacated Respondent's conviction and initiated proceedings in which Petitioner is going to retry Respondent. These vehicle problems provide further reasons to deny the petition.

In any event, and as explained further below, the Seventh Circuit did not err in its decision. In pronouncing a verdict of guilt, the trial court expounded the view that "all of the witnesses skirted the real issue." Pet. App. 4a. Rather than crediting Petitioner's witnesses and adopting Petitioner's view of what occurred, the trial court found that the victim was a drug dealer; that Respondent knew the victim was a drug dealer; and that Respondent wanted to kill the victim for that reason. Pet. App. 4a-5a. Yet, as the Seventh Circuit correctly held "there was no factual basis of any sort, in the trial record or elsewhere" for the latter two findings. Pet. App. 7a. The Seventh Circuit determined that by simply inventing two "facts" and then convicting Respondent on the basis of those "facts," the trial court had violated the clearly established legal proposition – uncontested by Petitioner – that a defendant has "the right to have [his] guilt or innocence adjudicated on the basis of evidence introduced at trial." Pet. App. 10a.

In addition, the Seventh Circuit cited and applied this Court's test from *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), for determining whether a constitutional error should be dismissed as "harmless" when challenged in a habeas corpus proceeding. Pet. App. 9a. Finding the evidence of guilt actually presented at trial "far from conclusive," the Seventh Circuit found that Respondent had met the *Brecht* standard. Pet. App. 8a-9a. There was thus no error in the Seventh Circuit's decision and this is yet another reason that the petition should be denied.

COUNTERSTATEMENT OF FACTS

A. Proceedings Before The Illinois Courts

Respondent was convicted of first-degree murder in November 2000 after a bench trial in the Circuit Court of Cook County. *See* Pet. App. 1a. The primary evidence introduced against Respondent came from two eyewitnesses, Maurice Johnnie and William Evans, who identified Respondent as the individual who murdered the victim, Ramon Nelson. *Id.* at 3a. As the Seventh Circuit noted, there were various internal inconsistencies in the testimony of both witnesses as well as inconsistencies between the two witnesses' testimony. *Id.*

Mr. Evans – who had been promised probation on two drug charges by the prosecution in return for his testimony, *see* Pet. App. 6a, – claimed that there had been two assailants, whereas Mr. Johnnie testified that there had only been one. *See id.* at 3a.

Mr. Evans testified that the victim had spoken with his assailants before the attack, whereas Mr. Johnnie did not testify to having seen any discussion. Pet. App. 3a. Although Mr. Evans supposedly had identified Respondent as the assailant in a line-up and photo array, during trial he twice identified the photograph of a different individual as the assailant despite Respondent's presence in the courtroom. *Id.* Although Mr. Johnnie identified Respondent in both the line-up and the photo array, as the Seventh Circuit observed, "[Respondent] Owens was the only person in the line-up who also was in the photo array, thereby diminishing the probative value of the second identification." *Id.* Petitioner also introduced at trial the fact that the victim, Mr. Nelson, had crack cocaine packaged for sale on his body when he was murdered. *See id.*

Entirely absent from the trial was any physical evidence linking Respondent to the murder such as, for example, Respondent's fingerprints on the murder weapon. *See* Pet. App. 3a. Similarly absent was any evidence that "[Respondent] Owens had known Nelson, used or sold illegal drugs, or had any gang affiliation." *Id.* Nevertheless, in pronouncing his judgment from the bench, the trial judge found:

> [A]ll of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer [Nelson], who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think

> the State's evidence has proved that fact. Finding of guilty of murder.

Pet. App. 4a-5a.

On direct appeal, Respondent raised various arguments including, as relevant here, that the trial court had made extrajudicial findings, and rendered its conviction based on factual assertions not introduced or proven at trial. In reviewing this argument, the Illinois Appellate Court observed "there is no indication whether or not the trial judge assessed the credibility of the eyewitnesses, resolved conflicts in their testimony, or weighed the evidence or drew reasonable inferences therefrom." Pet. App. 118a.

Moreover, the Illinois Appellate Court noted, "there is no physical evidence linking defendant to the crime and the identity of the perpetrator of the charged crime is at issue and defendant's conviction rests upon eyewitness identification testimony. " Pet. App. 120a. The court further acknowledged, "[i]t is true that Johnnie and Evans contradict each other on some points regarding the event," – noting specifically that Mr. Evans claimed there were two assailants while Mr. Johnnie claimed there was only one – "and the reliability of Evans' testimony is severely called into question." Pet. App. 119a, 119a n.2. Nevertheless, despite the fact that Respondent's conviction rested in essence on a sole eyewitness's identification, the court held "the trial court's speculation as to defendant's motive for assaulting

Nelson, will be construed as harmless error." Pet. App. 120a.

Justice South dissented. Unlike the majority, Justice South focused on the trial judge's stated basis for convicting Respondent, noting that "[w]hat we do have is a trial court manufacturing, supplying, and interjecting its own evidence into a trial and then affirmatively stating on the record that this manufactured evidence constituted the basis of its verdict." Pet. App. 128a-129a (South, J., dissenting). Justice South found the eyewitness identifications "marginal at best" given that Mr. Evans's testimony was "doubtful and highly suspect" – all the more so in light of his cooperation agreement – and that the trial court "never stated that [it] relied on [Mr. Johnnie's] identification or other properly admitted evidence." *Id.* at 127a-129a. As such, Justice South "fail[ed] to comprehend" how the trial court's conduct could be deemed harmless error, and would have held that "justice and fundamental fairness demand that defendant be afforded a new trial free from such prejudice." *Id.* at 129a. The Illinois Supreme Court denied Respondent's petition for leave to appeal in April 2003. Pet'n for Leave to Appeal at PageID 1794, *State of Illinois v. Owens*, No. 95534 (Ill. Apr. 2, 2003), ROA-ECF No. 152-2.[1]

Respondent pursued state collateral relief which, after a process lasting more than six years, proved

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[1] Citations to "ROA-ECF No. _" are to the Record on Appeal in *Owens v. Acevedo*, No. 1:08-cv-07159 (N.D. Ill.).

unsuccessful. Amended Memorandum Opinion & Order at 14-16, *Owens v. Acevedo*, No. 1:08-cv-7159 (N.D. Ill. May 29, 2012), ROA-ECF No. 89.

B. Proceedings Before The Federal Courts

In addition to his state collateral proceedings, Respondent brought a petition for habeas relief pursuant to 28 U.S.C. § 2254 raising, *inter alia*, his claim that the trial court had convicted him as a result of improper findings based on factual assertions other than those presented at trial. Amended Memorandum Opinion & Order at 1, (No. 1:08-cv-7159), ROA-ECF No. 89. The district court rejected Respondent's argument. *Id.* at 21. The Seventh Circuit granted Respondent a certificate of appealability, finding that Respondent had "made a substantial showing of the denial of his right to due process by the trial judge's reliance on extra-record facts when deciding Owens's guilt," Order, *Owens v. Duncan*, No. 14-1419 (7th Cir. May 12, 2014), ECF No. 11.

The Seventh Circuit reversed the district court and granted Respondent's § 2254 petition. Pet. App. 1a-10a. Focusing on the state trial court's own explanation for its finding of guilt, the Seventh Circuit held that Respondent's conviction violated his clearly established federal rights. *First*, the Seventh Circuit found, like the Illinois Appellate Court before it, that the record of this short trial contained absolutely no evidence to support the state trial court's finding that Respondent knew Mr. Nelson or that he had killed Mr. Nelson because of the latter's

participation in the illegal drug trade. *See id.* at 4a-5a. Recognizing that, in some cases, not every fact upon which a verdict is based must be found in the evidence introduced by a party, the Seventh Circuit distinguished the instant case because "there was no factual basis of any sort, in the trial record or elsewhere, for the judge's finding that Owens knew Nelson, let alone knew or cared that he was a drug dealer. The judge made it up." Pet. App. at 7a.

Second, the Seventh Circuit rejected Petitioner's characterization, which it again makes before this Court, of the issue in the case as whether it was permissible for a trial court to make an unsupported assertion about a defendant's motive once the trial court had determined the defendant's guilt based on the evidence presented at trial. *See* Pet. App. at 7a-8a, *see also* Pet. at 7-9. The Seventh Circuit accepted that "if the evidence of Owens's guilt had been overwhelming, the judge's conjecture that Owens knew Nelson and knew him to be a drug dealer and that Owens was . himself involved in the drug trade could be disregarded as goofy but harmless." Pet. App. 8a. But, as the Seventh Circuit found, no such holding was appropriate in light of the specific facts presented below. Rather, the "evidence of Owens's guilt was not overwhelming. Had it been, it is unlikely that the judge would have described Owens's supposed (but by only the judge) knowledge of Nelson's involvement in the drug business as 'the real issue' in the case. What may have made it the 'real issue' to the judge was the

scantiness of the actual evidence of Owens's guilt." *Id.* at 8a-9a. (Seventh Circuit's parenthetical).

Third, the Seventh Circuit turned to the relevant question under § 2254 of whether the state trial court's error violated Respondent's clearly established federal rights. Pet. App. 9a-10a. As the Seventh Circuit noted, cases such as *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986), *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978), and *Estelle v. Williams*, 425 U.S. 501, 503 (1976), all establish a defendant's "right to have one's guilt or innocence adjudicated on the basis of evidence introduced at trial...." Pet. App. 10a. "The Supreme Court has made clear in the cases we've cited and quoted from that a judge or a jury may not convict a person on the basis of a belief that has no evidentiary basis whatsoever." *Id.* On this basis, the Seventh Circuit found that Respondent had satisfied the "exacting standard" of § 2254. Pet. App. 9a-10a.

The Seventh Circuit thus reversed the district court's judgment denying Respondent's § 2254 petition and gave Petitioner 120 days within which to decide whether to retry Respondent. Pet. App. 10a. If Petitioner did not decide to retry Respondent, the Seventh Circuit ordered that Respondent be released from prison. *Id.*

C. Proceedings Following The Seventh Circuit's Decision

On March 26, 2015, Petitioner filed a Motion to Stay Issuance of Mandate Pending the Filing of a

Petition for a Writ of Certiorari with the Seventh Circuit. In its motion, Petitioner argued that it would suffer "irreparable injury should it be required to retry petitioner while simultaneously seeking to defend its state court judgment," but that Respondent's continued incarceration after his habeas petition was granted "cannot be characterized as imposing 'substantial harm' on him." Motion to Stay Issuance at 6-7, *Owens v. Duncan*, No. 14-1419 (7th Cir. Mar. 26, 2015), ECF No. 38. In an order dated March 30, 2015, without calling for a response, the Seventh Circuit denied Petitioner's petition for a stay. Order, No. 14-1419 (7th Cir. Mar. 30, 2015), ECF No. 39.

On April 17, 2015, Petitioner filed an application with this Court asking that it stay the mandate of the Seventh Circuit pending its anticipated filing of a petition for certiorari. Application To Recall And Stay Mandate at 1, *Duncan v. Owens*, No. 14-1516 (U.S. Apr. 17, 2015) (No. 14A1074). Repeating almost verbatim the text of its motion before the Seventh Circuit, Petitioner again argued that its interest in not having to retry Respondent while a petition for a writ of certiorari was pending outweighed Respondent's interest in being released from custody. *Id.* at 4-7. On April 30, 2015, Respondent filed an opposition to Petitioner's application, and on May 11, 2015, Justice Kagan denied Petitioner's application. *Duncan v. Owens*, No. 14-1516, Order denying stay of mandate (U.S. May 11, 2015) (No. 14A1074) (Kagan, J.)

On June 22, 2015, the final day on which it could timely file a petition for certiorari, Petitioner filed its petition for a writ of certiorari with this Court.

On July 21, 2015, the final day on which it could decide to initiate retrial proceedings pursuant to the Seventh Circuit's decision, Petitioner filed a motion styled as a "Status Report" with the district court where it announced "that it has decided to [retry Respondent.]." Status Report, *Owens v. Duncan*, No. 08-cv-7159 (N.D. Ill. July 21, 2015), ROA-ECF No. 166. After announcing its decision, however, Petitioner said it "anticipate[d] taking no further action in Cook County Circuit Court until the resolution of respondent's petition for a writ of certiorari in order to avoid interfering, conflicting, or mooting, respondent's ongoing appeal in this case." *Id.* at 2-3.

On July 28, 2015, the district court held a hearing regarding Petitioner's "Status Report," and a few hours after the hearing indicated to counsel via an email from a law clerk that it would "not extend the time to initiate proceedings in state court pending the outcome of respondent's petition for writ of certiorari." On July 29, 2015, the district court issued an order denying Petitioner's motion and providing that "[p]ursuant to the grant of a writ of habeas corpus" the state was required either to "initiate[] retrial proceedings" or to release Respondent by August 4, 2015. Order, *Owens*, No. 08-cv-7159 (N.D. Ill. July 29, 2015), ROA-ECF No. 175.

On July 28, 2015, Petitioner filed a second application with this Court, asking once again that the mandate of the Seventh Circuit be stayed pending this Court's resolution of its petition for certiorari. In this second application Petitioner suggested for the first time that "arguably, one consequence of the issuance of the writ of habeas corpus now would be to moot applicant's petition for a writ of certiorari." Application To Recall And Stay Mandate at 5, *Duncan v. Owens*, No. 14-1516 (U.S. July 28, 2015) (No. 15A111). Later in the same application, Petitioner again emphasized that "if the Seventh Circuit's mandate is carried out" – something that has now occurred in light of the district court's order of July 29, 2015 – "the State may have no choice but to take action that arguably might moot applicant's appeal [*i.e.* petition for a writ of certiorari] to this Court." Application at 9; *see also id.* at 10 (claiming the public had a compelling interest in the "State not being compelled to abandon [this Court's] review process"). On July 30, 2015, Justice Kagan denied Petitioner's second application. *Duncan v. Owens*, No. 14-1516, Order denying stay of mandate (U.S. July 30, 2015) (No. 15A111) (Kagan, J.).

On July 30, 2015, Petitioner renewed its application, presenting for a third time its arguments for a stay before this Court. Petitioner also requested that its renewed application be presented to Justice Scalia. On August 13, 2015, Justice Scalia denied the renewed application. *Duncan v. Owens*, No. 14-1516, Order denying stay

of mandate (U.S. Aug. 13, 2015) (No. 15A111) (Scalia, J.).

On August 4, 2015, the Acting Presiding Judge of the Cook County Circuit Court – Criminal Division, ordered that Respondent's conviction be vacated immediately consistent with the district court's order of July 29, 2015. The court then held a brief bail hearing and directed that the case be referred to the Presiding Judge of the Sixth Municipal District (where Respondent's original trial had been held) for assignment to an active trial calendar. Trial proceedings in which Petitioner intends to retry Respondent are now in progress.

REASONS FOR DENYING THE PETITION

I. The Petition For Certiorari Solely Seeks Fact-Bound Error Correction.

Petitioner has identified no valid, let alone compelling, reason for this Court to grant certiorari. Petitioner concedes "the absence of a circuit split," Pet. at 11, as it must, and all but acknowledges that the Seventh Circuit's decision is nothing more than the application of well-settled law to the specific set of facts presented by Respondent's case.

Indeed, searching the Seventh Circuit's decision, there are only three propositions of law contained within it, and each is uncontested. *First*, the Seventh Circuit observed, "only clearly established violations of a defendant's constitutional rights permit us to reverse a state court decision challenged

in a federal habeas corpus proceeding." Pet. App. 9a-10a (citing *Nevada v. Jackson*, 133 S. Ct. 1990 (2013)). There is, of course, no dispute over this proposition established in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132 and this Court's decisions interpreting AEDPA.

Second, the Seventh Circuit noted that various decisions of this Court affirm a basic principal of a fair trial, namely that "a judge or a jury may not convict a person on the basis of a belief that has no evidentiary basis whatsoever." Pet. App. 10a (citing *Holbrook v. Flynn*, 475 U.S. 560 (1986); *Taylor v. Kentucky*, 436 U.S. 478 (1978); *Estelle v. Williams*, 425 U.S. 501 (1976)). Again, Petitioner does not contest this rule, or claim that an individual can fairly be convicted based on evidence other than that presented at trial.

Third, the Seventh Circuit analyzed the trial court's error under the harmless error test this Court promulgated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), to determine whether the error had a "substantial and injurious effect" on Respondent's rights. Pet. App. 9a. Yet again, Petitioner claims no error in the use of this test.

Bereft of any claim that the Seventh Circuit either propounded a new legal standard in conflict with another Circuit or decided some open and important question of federal law, Petitioner instead makes a classic plea for error correction. Petitioner argues that "[t]he Seventh Circuit's published

decision defies AEDPA and the many decisions of this Court establishing and reaffirming that clearly established Supreme Court precedent is required to support a grant of habeas relief." Pet. at 7. Petitioner's basis for this claim is that "no case supports respondent's claim that because no evidence directly established the trial court's inference as to his motive, which was not an element of his crime, his rights were violated." *Id.* Rather, Petitioner asserts, "the cases on which the Seventh Circuit relied involved juries that were exposed to prejudicial and improper information or influences from which guilt could be inferred." Pet. at 8. Moreover, Petitioner claims that in reading the trial transcript the Seventh Circuit "mischaracteriz[ed] the state trial judge's remarks." Pet. at 7, 10.

For the reasons described in Part II *infra*, the Seventh Circuit's decision correctly cites and relies upon clearly established precedent from this Court. But, as pertinent here, Petitioner argues only that the Seventh Circuit misunderstood the meaning of the specific words used by the trial court and misunderstood the precise holdings of this Court's cases. Petitioner thus seeks fact-bound error correction, based on the application of undisputed precedent to the highly fact-specific scenario presented at Respondent's trial. That is not a basis for this Court to exercise its certiorari jurisdiction. Rule 10 states: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *See* Sup. Ct. R. 10.

Decisions of this Court for many years have borne out this rule's command. For example, in *United States v. Johnston*, 268 U.S. 220 (1925), the Court observed "We do not grant a certiorari to review evidence and discuss specific facts." *Id.* at 227; *see also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

Finally, in the last two of its three applications before this Court seeking to stay the mandate of the Seventh Circuit's decision, Petitioner suggested that its petition might be rendered moot were this Court to deny the application for a stay and the Illinois state courts were to vacate Respondent's conviction pursuant to the grant of habeas relief. *See* Application To Recall And Stay Mandate at 5, *Duncan*, No. 14-1516 (U.S. July 28, 2015); [Renewed] Application To Recall And Stay Mandate at 5, *Duncan*, No. 14-1516 (U.S. July 30, 2015). Since Petitioner made those arguments on July 28 and July 30, 2015, both of the eventualities Petitioner identified have come to pass: this Court has denied Petitioner's repeated applications for a stay and Respondent's conviction has now been vacated by the Illinois state courts. *See Duncan*, Order denying stay of mandate (U.S. May 11, 2015) (No. 14A1074) (Kagan, J.); *Duncan*, Order denying stay of mandate (U.S. July 30, 2015) (No. 15A111) (Kagan, J.), *Duncan*, Order denying stay of mandate (Aug. 13, 2015) (No. 15A111) (Scalia, J.); Order, *Owens v.*

Duncan, No. 08-cv-7159 (N.D. Ill. July 29, 2015), ROA-ECF No. 175; Order, *People v. Duncan*, No. 99CR2528701 (Cir. Ct. Cook Cty. Aug. 4, 2015). Petitioner twice suggested to this Court that if these events were to occur, the petition for a writ of certiorari could be rendered moot and, unless Petitioner has now reversed his position, the vehicle issue presented by the potential mootness of this petition presents yet another reason it should be denied.

II. Petitioner's Arguments On The Merits Are Erroneous.

For the reasons discussed in Section I above, this petition for a writ of certiorari should be denied quite apart from the merits of the Seventh Circuit's decision because the highly fact-bound question presented is not cert-worthy. *See* Sup. Ct. R. 10. But, looking to the merits of the Seventh Circuit's decision presents another reason certiorari should be denied, because that decision was entirely correct.

Petitioner's argument is based on a false premise, namely that the trial court merely made an "inference as to [Respondent's] motive, which was not an element of his crime." Pet. at 7. Petitioner made this same argument before the Seventh Circuit, which correctly recognized that this claim "mistakenly characterize[d]" Respondent's objection to the trial court's action. Pet. App. 7a. As the Seventh Circuit noted, "[h]ad the judge said that he'd found the defendant guilty beyond a reasonable doubt on the basis of the evidence presented at the

trial, and merely added that 'by the way my guess is that Owens knew Nelson and killed him for reasons related to their both being drug dealers,' Owens would have no case, because the judge's observation would not have been the basis of Owens's conviction." Pet. App. 8a. But, of course, that is not what the trial court said.

To the contrary, the trial court determined that the witnesses at trial "skirted the real issue," and that "Owens's supposed (but by only the judge) knowledge of Nelson's involvement in the drug business [w]as 'the real issue' in the case." Pet. App. 8a (Seventh Circuit's parenthetical), *see also id.* at 4a. Thus, the trial court did not merely propose a superfluous theory of the crime, rather "the only ground for [the trial court] finding Owens guilty that he mentioned had no basis in that record (or elsewhere for that matter)." Pet. App. 6a-7a.

Petitioner argues that the "judge explicitly referred to 'the State's evidence' in rendering his verdict" in an attempt to argue that the trial court's verdict was not based on the "facts" the trial court invented, but rather on the evidence actually presented at trial. Pet. at 10-11. That argument is unsustainable. The trial court's actual words were that "the State's evidence has proved *that fact*." Pet. App. 5a (emphasis added). "[T]hat fact," of course, was that "you have a seventeen year old youth on a bike who is a drug dealer [Nelson], who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off." Pet. App. 4a-5a. The mere reference to "the State's evidence" cannot transform the trial

court's error into a measured consideration of the evidence that was actually presented at trial.

Clearly established precedent from this Court makes clear that a conviction cannot be based on facts not introduced into evidence at trial. The three cases from this Court that the Seventh Circuit cited in its decision establish this point beyond peradventure. A bedrock principle of the criminal justice system is the right to a fair trial, which the Supreme Court has characterized as a "fundamental liberty secured by the Fourteenth Amendment." *Estelle*, 425 U.S. at 503. Integral to a fair trial, "is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on circumstances not adduced as proof at trial." *Holbrook*, 475 U.S. at 567 (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)). Petitioner's attempt to limit these cases narrowly to their facts, by for example claiming that *Holbrook* solely relates to the presence of additional uniformed guards in a courtroom or that *Williams* concerns only courtroom attire, misses the fundamental point these cases stand for. Pet. at 8-9.[2]

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[2] Petitioner also focuses on an irrelevancy in complaining that the "Seventh Circuit pointed to two of its own decisions" in granting relief under § 2254. Pet. at 9. The Seventh Circuit noted that "only clearly established violations of a defendant's constitutional rights" could constitute the basis for habeas relief, and cited three decisions from this Court for the established principal of law it was relying upon. Pet. App. 9a-10a. The fact that two decisions from the Seventh Circuit also

In the end, Petitioner does not dispute that the trial court could not have convicted Respondent based on facts outside of the record. The only way Petitioner can defend the trial court's verdict is by misconstruing his words. The Seventh Circuit's rejection of Petitioner's argument was entirely correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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acknowledged the basic principle that a defendant may not be convicted based on evidence not introduced at trial is of no significance.

SEP - 2 2015

No. 14-1516

In the
Supreme Court of the United States

STEPHEN DUNCAN, Warden,
PETITIONER,

v.

LAWRENCE OWENS,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner, Stephen Duncan, Warden of the Lawrence Correctional Center in Sumner, Illinois, demonstrated in his petition for a writ of certiorari that this Court should reverse the Seventh Circuit's judgment below, either summarily or after briefing and argument, because it violates Congress's prohibition on habeas relief in the absence of clearly established precedent of this Court supporting respondent's claim. *See* 28 U.S.C. § 2254(d)(1). In his brief in opposition, respondent makes three basic arguments: (1) the petition seeks only error correction; (2) the Seventh Circuit's holding was correct on the merits; and (3) the case presents vehicle problems due to potential mootness issues. But this petition presents an important issue of federal law, the Seventh Circuit's judgment was wrong as a matter of law, and the case is not moot. Thus, none of respondent's arguments should dissuade this Court from granting certiorari and either summarily reversing or setting the case for argument.

I. This Case Presents An Important Issue Of Federal Law That Warrants This Court's Review.

This Court has taken a special interest in the proper application of § 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act, ("AEDPA"), 28 U.S.C. § 2254(d)(1), and in giving effect to that statute's emphasis on "comity, finality, and federalism," *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Specifically, in a series of cases, this Court has

repeatedly admonished lower courts that habeas relief may be granted only where a state court's holding was either contrary to, or an unreasonable application of, clearly established precedent of this Court. *See, e.g.*, *Woods v. Donald*, 135 S. Ct. 1372, 1378 (2015) (per curiam) (no clearly established precedent); *Glebe v. Frost*, 135 S. Ct. 429, 430-32 (2014) (per curiam) (same); *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam) (same); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (same); *Wright v. Van Patten*, 552 U.S. 120, 124-26 (2008) (per curiam) (same; reversing Seventh Circuit); *Hardy v. Cross*, 132 S. Ct. 490, 495 (2011) (per curiam) (reversing Seventh Circuit and focusing on "unreasonable application" prong of § 2254(d)(1)). The absence of a circuit split did not deter this Court from insisting on compliance with § 2254(d)(1) in any of these cases.

Respondent does not and cannot claim otherwise. Indeed, he makes no effort to distinguish this long line of cases, and instead merely recites the general proposition that this Court does not engage in error correction. *See* Brief in Opposition (BIO) at 14-16. But as this Court has shown again and again, the proper application of AEDPA is, in and of itself and even in the absence of a circuit split, worthy of the Court's attention. Because the Seventh Circuit's grant of habeas relief in this case is impossible to reconcile with AEDPA, or with the decisions of this Court construing it, this Court should grant certiorari and either summarily reverse the judgment in this case, or, in the alternative, set the case for full briefing and argument.

II. The State Court's Rejection Of Respondent's Claim Was Neither Contrary To, Nor An Unreasonable Application Of, Any Clearly Established Supreme Court Precedent.

The Seventh Circuit's opinion in this case failed to adhere to § 2254(d)(1)'s bar on relitigating a claim decided on the merits in state court. The only relevant exception to that rule is when the state court's opinion was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. But that exception does not apply in this case because the cases on which the Seventh Circuit relied simply do not address the circumstances here.

Respondent claims the Seventh Circuit made only three legal determinations: (1) "only clearly established violations of a defendant's constitutional rights permit us to reverse a state court decision challenged in a federal habeas corpus proceeding"; (2) "a judge or a jury may not convict a person on the basis of a belief that has no evidentiary basis whatsoever"; and (3) the trial court's "error" was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). BIO at 13-14. But even if these assertions were wholly uncontested, they are insufficient to support habeas relief under § 2254(d)(1). To obtain relief, respondent *also* had to show that the state court's rejection of respondent's specific claim was contrary to (or an unreasonable application of) clearly established Supreme Court precedent. Federal courts may not grant habeas relief on the basis of overly general readings of this Court's precedents, *see Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam); or in the absence of

precedent from this Court holding that a specific alleged error violates a defendant's constitutional rights, *see Wright*, 522 U.S. at 124-26; *Musladin*, 549 U.S. at 77. The Seventh Circuit's decision violates this rule.

Respondent claimed that he was denied the right to a fair trial by the trial court's "extrajudicial findings regarding [his] motive to commit murder." Pet. App. at 75a. But the Illinois Appellate Court rejected this claim, and this Court has never held that a defendant's constitutional rights are violated where the factfinder infers a non-element of the crime—as the trial judge did with motive in this case, *see People v. Hobbs*, 220 N.E.2d 469, 472 (Ill. 1966) (holding that motive is not an element of murder).

In contrast, the cases on which respondent and the Seventh Circuit rely stand for the proposition that a defendant's constitutional rights can be violated where the trier of fact is improperly influenced by external factors beyond the evidence introduced at trial. *See Taylor v. Kentucky*, 436 U.S. 478, 485-88 (1978) (no fair trial where prosecution invited jury to infer defendant's guilt from fact that defendant had been arrested and indicted and court provided inadequate instructions regarding burden of proof); *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (no fair trial where defendant compelled to appear before jury in prison attire); *Holbrook v. Flynn*, 436 U.S. 478, 572 (1978) (fair trial despite presence of additional, uniformed security personnel in courtroom). But respondent does not suggest that the trial judge's inference resulted from

such outside influences. Therefore, he cannot properly rely on these cases to obtain habeas relief.

Respondent argues that *Taylor*, *Williams*, and *Flynn* stand for the general, and undisputed, proposition that a defendant cannot be found guilty on the basis of evidence not in the record. BIO at 19. The Seventh Circuit agreed. Pet. App. at 10a (describing this Court's precedent as holding that "a judge or a jury may not convict a person on the basis of a belief that has no evidentiary basis whatsoever"). But this approach violates this Court's repeated admonishments "against 'framing [its] precedents at such a high level of generality.'" *Smith*, 135 S. Ct. at 4 (2014) (quoting *Jackson*, 133 S. Ct. at 1994 (per curiam)).

In fact, not only has this Court explicitly warned against such generalizations, but it has rejected an attempt to generalize from the holdings of *Williams* and *Flynn* themselves in factual circumstances much closer to them than the circumstances presented here. In *Musladin*, the habeas petitioner argued that his right to a fair trial was violated when members of the victim's family sat in the front row of the gallery during trial wearing buttons with the victim's picture on it. 549 U.S. at 72. The state court denied this claim. *Id.* at 73. The Ninth Circuit subsequently granted habeas relief, holding that the state court's opinion was contrary to the rule of federal law clearly established by *Williams* and *Flynn*. *Id.*

This Court summarily reversed, holding that *Williams* and *Flynn* dealt only with the effect of state-

sponsored courtroom practices on defendants' fair-trial rights—in *Williams*, granting relief due to a requirement that the defendant appear before the jury in prison garb, 425 U.S. at 51, and in *Flynn*, denying relief where extra uniformed security personnel were in the courtroom, 475 U.S. at 572. As a result, this Court held that those cases did not clearly establish that similarly prejudicial *spectator* conduct could violate a defendant's right to a fair trial. *Musladin*, 549 U.S. at 75-76. The distinction between respondent's claim here and the rule established by *Williams* and *Flynn* is even starker: these cases cannot be said to clearly establish any rule applicable to this case, where respondent has never argued that any such prejudicial factor influenced the verdict.

Where, as here, this Court has never clearly held that respondent's claim (or one very close to it) would result in a violation of his federal constitutional rights, the state court did not unreasonably apply clearly established Supreme Court precedent in denying him relief. *See, e.g.*, *Wright*, 522 U.S. at 125; *Musladin*, 549 U.S. at 77; *see also Davis v. Ayala*, 576 U.S. ___, slip. op. at 11 (2015) (state court decision holding a constitutional claim harmless constituted adjudication on the merits, and accordingly, habeas relief could not be granted unless state court's rejection of claim was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent). And because there is no error warranting relief under § 2254(d)(1), respondent's claim that there are fact-specific questions of harmless error at issue, BIO at 1,

likewise fails. Questions of harmlessness are irrelevant where there is no error.

To be sure, the finder of fact must find all *elements* of a crime proven beyond a reasonable doubt based on the evidence introduced at trial. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 499-500 (2000); *In re Winship*, 397 U.S. 358, 364 (1970). But neither respondent nor the Seventh Circuit cites *Apprendi*, *Winship*, or other precedent in that line of cases. Nor does respondent argue that there was insufficient evidence with respect to any particular element of respondent's crime. Instead, respondent and the Seventh Circuit try to suggest that the trial court found respondent guilty *solely* on a ground without support in the record. BIO at 18, Pet. App. at 6a-7a. That argument, however, is not only forfeited because of respondent's failure to argue the correct legal theory in any federal court, *see, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (arguments not raised below are forfeited); *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (deeming waived argument not raised in federal appeals court or in brief in opposition in this Court), but it is also utterly implausible. There would have been no reason for the trial court to infer motive in the absence of the evidence that respondent in fact committed the crime.

Likewise, the two "facts" that respondent claims were "made up", BIO at 18, by the trial court—that respondent knew the victim was a drug dealer and that he killed the victim for that reason—have nothing to do with the elements of first degree murder. *See* 720 ILCS 5/9-1(a) (1999) (defining first degree murder in

Illinois). As a result, respondent's claim that reviewing the Seventh Circuit's judgment would require this Court to parse the trial judge's comments, BIO at 15-16, is misplaced. Even if it were true that the judge "made up" those facts, respondent cannot prevail because the evidence was sufficient to convict him.

Because the state court's rejection of respondent's claim is neither contrary to, nor an unreasonable application of, any precedent of this Court, respondent is barred from obtaining habeas relief on that claim.

III. The Petition Is Not Moot Because The State Trial Court Retains Jurisdiction To Reverse Its Own Order Granting Respondent A New Trial.

This case is not moot. In Illinois, individual State's Attorneys, elected at the county level, Ill. Const. Art. VI, § 19, represent the State in most criminal prosecutions in the state trial courts, 55 ILCS 5/3-9005(a). The Illinois Attorney General represents the State in the Supreme Court. 15 ILCS 205/4. When the Cook County State's Attorney's Office informed the federal district court that actions it would have to take to retry respondent might open the door to arguments that this petition had become moot, petitioner was obligated to notify this Court of that possibility. As respondent observes, petitioner did so in his second application for a stay to Justice Kagan, which was renewed for consideration by the entire Court. *See* BIO at 16-17 That application was denied. *Duncan v. Owens*, No. 14-1516, Order denying stay of mandate (U.S. July 30, 2015) (No. 15A111) (Kagan, J.); *Duncan*

v. Owens, No. 14-1516, Order denying stay of mandate (U.S. Aug. 13, 2015) (No. 15A111). But the petition is not moot, and respondent does not even argue that it is.

To comply with the Seventh Circuit's judgment, the State had to decide whether to retry respondent before this Court could rule on this petition for certiorari. The first step in such a retrial was to ask the Circuit Court of Cook County to vacate the prior conviction. *See People v. Bailey*, 4 N.E.3d 474, 479 (Ill. 2014). As respondent explains, that court has now vacated the conviction. BIO at 13.

There is no precedent in Illinois expressly precluding or allowing reinstatement of that conviction should petitioner be successful in this Court. But the general rule is that so long as the Illinois trial court retains jurisdiction over the retrial it has the authority to reverse its order granting respondent a new trial. *See People v. Mink*, 565 N.E.2d 975, 978-79 (Ill. 1990) (trial court had jurisdiction to reconsider order granting defendant new trial so long as case was pending before it). Because the better reading of Illinois law would allow reinstatement of respondent's original conviction—and even respondent does not argue otherwise—no vehicle problem prevents this Court from reviewing and reversing the Seventh Circuit's judgment, either summarily or after briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2015

No. 14-1516

In the
Supreme Court of the United States

STEPHEN DUNCAN, Warden,
PETITIONER,

v.

LAWRENCE OWENS,
RESPONDENT.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

JOINT APPENDIX

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Petition for Certiorari Filed June 22, 2015
Certiorari Granted October 1, 2015

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United States ex rel. Owens v. Hodge, 08 C 7159 (N.D. Ill. Feb. 11, 2014) (memorandum opinion denying habeas relief on ineffective assistance of counsel and declining to issue certificate of appealability for all claims) 11a

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA *ex rel.* LAWRENCE OWENS,	)	No. 08 C 7159
	)	Judge Thomas M. Durkin
Petitioner,	)	
v.	)	
STEPHEN DUNCAN, Warden, Lawrence Correctional Center,	)	
Respondent.	)	

Date Filed	No.	Docket Text
04/23/2012	79	Memorandum Opinion and Order Signed by the Honorable Rebecca R. Pallmeyer on 4/23/2012: Mailed Notice (ETV,) (Entered: 4/24/2012)
02/11/2014	153	Memorandum Opinion and Order: For the foregoing reasons, Owens's petition for a writ of habeas corpus is denied, and the court declines to issue a certificate of appealability for any of his claims. Civil Case Terminated. Signed by the

		Honorable Thomas M. Durkin on 2/11/2014: Mailed Notice (SRN,) (Entered: 2/11/2014)
07/29/2015	175	Order: Upon consideration of respondent's status report dated July 21, 2015, the arguments presented to the court at the July 28, 2015 conference, and the papers submitted by respondent for the court's review, it is hereby ordered that respondent's request for an extension of time to initiate criminal retrial proceedings in state court pending a ruling of respondent's petition for a writ of certiorari is denied. Pursuant to the grant of a writ of habeas corpus, petitioner must be released from custody by no later than August 4, 2015, unless, on or before that date, the State of Illinois initiates retrial proceedings, pursuant to the Illinois Criminal Code, in the Circuit Court of Cook County, Criminal Division. Signed by the Honorable Thomas M. Durkin on 7/29/2015. Mailed Notice. (JL) (Entered: 7/30/2015)
07/30/2015	174	Transcript of Proceedings Held on 7/28/2015 Before the Honorable Thomas M. Durkin.

Court Reporter Contact Information: Laura Renke, Laura_Renke@ilnd.uscourts.gov, 312.435.6053. Important: The transcript may be viewed at the court's public terminal or purchased through the court reporter/transcriber before the deadline for release of transcript restriction. After that date it may be obtained through the court reporter/transcriber or PACER. For further information on the redaction process, see the court's website at www.ilnd.uscourts.gov. Under quick links select policy regarding the availability of transcripts of court proceedings. Redaction Request Due 8/20/2015. Redacted Transcript Deadline Set for 8/31/2015. Release of Transcript Restriction Set for 10/28/2015. (Renke, Laura) (Entered: 7/30/2015)

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LAWRENCE OWENS,	)	Appeal from the
	)	United States District
Petitioner-Appellant,	)	Court for the Northern
	)	District of Illinois,
	)	Eastern Division
v.	)	
	)	No. 08 C 7159
STEPHEN DUNCAN, Warden,	)	
	)	Judge Thomas M. Durkin
Respondent-Appellee.	)	

Date Filed	No.	Docket Text
03/23/2015	36	Filed Opinion of the Court by Judge Posner. The judgment denying Owens relief is reversed. The State is given 120 days in which to decide whether to retry him. If it does not decide within that period to retry him, he must be released from prison. Richard A. Posner, Circuit Judge; Michael S. Kanne, Circuit Judge and Daniel Tinder, Circuit Judge. [36] [6649848] [14-1419] (FP)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS	)	Indictment No. 99 CR 25287
VS	)	Before Judge JOSEPH
LARRY OWENS	)	MACELLAIO
	)	Wednesday, November 8, 2000,
	)	Bench Trial

APPEARANCES:

I. HON. RICHARD A. DEVINE, State's Attorney of Cook County, by MESSRS. MICHAEL GOLDEN and WILLIAM DELANEY, Assistant State's Attorneys, appeared for the People;

II. MS. RITA A. FRY, Public Defender of Cook County, by MESSRS. FRANK RAGO and JOHN WILSON, Assistant Public Defenders, appeared for the Defendant.

REPORTED BY
Cherylyn D. Thompson, CSR, RPR, 084-001143

[C3]THE CLERK: Larry Owens.

THE COURT: Mr. Owns, if convicted, you could be sentenced from a minimum of twenty years up to sixty years. It is my understanding at this time after talking with your lawyer you are going to give up your right to a jury trial. That is where twelve people decide the facts of the case, and you want me to decide the case.

THE DEFENDANT: Yes, sir.

THE COURT: Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Let the record reflect being represented by counsel, the defendant has waived his right to a jury trial. Any opening statements by either side?

MR. GOLDEN: Yes, Judge.

MR. RAGO: There will be a motion for exclusion and segregation of witnesses.

THE COURT: Mutual motions to exclude. Anybody that will be a witness in the courtroom will have to step outside. Go ahead, State.

OPENING STATEMENT

BY MR. GOLDEN:

Your Honor, we believe the evidence in this case will show that on September 22nd of 1999, Ramon Nelson was a seventeen year old boy, who had the unfortunate chance to [C4]meet Mr. Owens up at Mackie's Lounge located at 15860 Dixie Highway. Ramon Nelson was riding his bike. He was talking with people that he knew in the parking lot. At that time, at approximately 8:30 PM, a witness saw Larry Owens walk past with a baseball bat. That witness is Willie Evans.

He recognized Larry Owens, and he paid no attention to him until he heard what he describes as a sick sound like wood breaking. He looked around the corner and saw Ramon Nelson lying on the ground still on his bike when Larry Owens took the baseball bat and struck him two to three times in the head.

This is corroborated by another witness, Maurice Johnnie, who was also in that area, Judge. He was in a car parked in front of Mackie's Lounge. He had been talking with Ramon Nelson shortly before he was attacked by Lawrence Owens. That happened on September 22nd.

Within a week, Judge, independently both witnesses picked Larry Owens' photograph out of a photo array. Approximately one month later, they identified him in a lineup.

That is what the evidence will show, Judge, and as a result of the brutal attack by Lawrence Owens, Ramon Nelson passed away on September 23rd. At the end of the [C5]trial, we will be asking you to find the defendant guilty of first degree murder.

THE COURT: Okay. Defense, are you going to make an opening statement?

MR. RAGO: Yes, Judge, please.

OPENING STATEMENT

BY MR. RAGO:

Mr. Owens has put this matter in the Court's hands, so I don't have to go through those usual admonishments we give to the jury about proof beyond a reasonable doubt, but what we suggest to the Court is that when you listen to all the evidence and the testimony, what is going to be important is where people were, what could they have possibly seen, what didn't they say that normally you would have expected at this point to be said.

When you look at all those and look at the facts and circumstances surrounding this incident, the facts and circumstances about the actual location, when you look at the nature and manner in which certain people testify and the reasons and motivations that they may have to testify, Judge, again, the State has to prove beyond a reasonable doubt. We believe that the State will fail in this cause.

[C6]That Ramon is dead is a tragedy. The conviction of the wrong man is also no less a tragedy, Judge. We will be asking for a finding of acquittal.

THE COURT: Okay, State, do you want to call your first witness.

MR. GOLDEN: Your Honor, the people will call Barbara Nelson.

1. (Witness sworn)

THE COURT: Have a seat.

BARBARA NELSON,

called as a witness herein, on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GOLDEN:

Q. Ma'am, would you state your name and spell it for the court reporter?

A. My name is Barbara, B-a-r-b-a-r-a, Nelson, N-e-l-s-o-n.

Q. And Ms. Nelson, where do you live?

A. I live in the Markham area in Bellaire Park.

Q. And how long have you lived there?

A. For about three years.

Q. Before that, where did you live?

[C7]A. Before then I lived at – I lived in Harvey. I don't remember the exact address.

Q. How long had you lived in Harvey?

A. For about four years.

Q. Are you employed?

A. Yes, I am.

Q. And who do you work for?

A. I work for a company, the Bradford Exchange in Niles, Illinois.

Q. And what do you do for them?

A. I am a marketing coordinator.

Q. I would like to direct your attention to September of 1999, where were you living at that time?

A. At that time I was living in Markham, Illinois, in the Bellaire Park area.

Q. Who were you living with?

A. My son; Ramon Nelson, and my husband; Cecil.

Q. And how old was Ramon at that time?

A. Ramon was seventeen years old at that time.

Q. Did he have any nicknames?

A. Yes, he had. His friends call him Kermit, because he had large eyes like Kermit the frog.

Q. Could you describe Ramon for us?

A. Ramon was tall, a lot taller than I am, slender, [C8]he was he was just a regular seventeen year old kid. He was nice, playing with the kids all the time and joke and laugh with me, that is about it.

MR. GOLDEN: Your Honor, may I approach?

THE COURT: Go ahead.

MR. GOLDEN:

Q. Mrs. Nelson, I will show you what has previously been marked as People's Exhibit Number 1. Do you recognize that?

A. Yes, that is my son.

Q. That is Ramon?

A. Ramon, yes.

Q. Does that fairly and accurately depict the way Ramon was in 1999?

A. Yes.

Q. I would like to direct your attention to September 21st, 1999, the evening hours, did you see Ramon?

A. Yes, I saw him.

Q. And what was his condition at that time?

A. He was fine. We were laughing and joking when I came from work.

Q. Did you see him in the morning of September 22nd?

[C9]A. Yes, before I left to go to work.

Q. And what was his condition at that time?

A. He was fine when I left to go to work.

Q. Sometime after 8:30 on the night of September 22nd, 1999, did you receive a phone call?

A. Yes.

Q. And after receiving that phone call, what did you do?

A. Someone called me and said that I need to come to Ingalls Hospital, because Ramon had been hurt, somebody hit him in the head at Mackie's.

Q. Did you go to Ingalls Hospital?

A. Yes, I did.

Q. Did you see Ramon that day?

A. Yes, I did.

Q. What condition was he in?

A. He was very bad. A lot of blood and the left side of his face was all swollen and they had him sedated.

Q. Was he conscious?

A. No.

Q. Directing your attention to September 23rd, 1999, did Ramon pass away?

A. Yes, he did. He was pronounced brain dead at [C10]5:30 PM.

Q. Did he ever regain consciousness?

A. No, he never regained consciousness. I never got a chance to talk to him.

MR. GOLDEN: Your Honor, I believe at this time there will be a stipulation between the parties that if we were to show People's Exhibit Number 2 to Mrs. Nelson she would identify it as a photo of Ramon Nelson.

MR. RAGO: So stipulated.

THE COURT: Okay.

MR. GOLDEN: I have nothing further.

MR. RAGO: I have no questions.

THE COURT: Thank you, ma'am. There are no other questions.

MR. GOLDEN: I would ask permission for this witness to remain throughout the proceedings.

THE COURT: Sure, any objection?

MR. RAGO: No objection.

The COURT: You can go sit out in the audience if you want. If you want to grab your purse, if it is back there.

THE WITNESS: My sister has it.

2. Witness excused)

THE COURT: Next witness.

[C11]MR. DELANEY: State calls Maurice Johnnie.

3. (Witness sworn)

MAURICE JOHNNIE,

called as a witness herein, on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DELANEY:

Q. Sir, could you please state your name for the Court and spell your first and last name for the court reporter?

A. My name is Maurice Johnnie, M-a-u-r-i-c-e, J-o-h-n-n-i-e.

Q. Mr. Johnnie, if I can just remind you to just speak up so everyone in the courtroom can hear you.

THE COURT: Talk like you are talking to the lawyer right back there, so we can hear you.

THE WITNESS: All right.

MR. DELANEY:

Q. How old are you, sir?

A. I am forty-eight years old.

Q. And what town do you live in?

A. I live in the south suburbs.

Q. How long have you lived in the south suburbs?

[C12]A. Well, for the past four years.

Q. And before that, where did you live?

A. On the north side of Chicago.

Q. And what do you do for a living, Mr. Johnnie?

A. I am an industrial painter.

Q. How long have you had that occupation?

A. For the past ten years.

Q. Mr. Johnnie, do you remember where you were on September 22nd of 1999, sometime after 8:00 in the evening?

A. I was in the company with a friend of mine, Johnnie Morgan, and another guy. We had pulled up in front of Mackie's where --

Q. Now, when you say Mackie's, what are you talking about?

A. Mackie's is a store, a liquor store on 159th and Dixie Highway.

Q. That is in Markham?

A. In Markham, yes.

Q. You were in a car?

A. Yes, I was in a car.

Q. Whose car were you in?

A. I was in my car.

Q. Who was driving the car?

[C13]A. Johnnie Morgan was driving the car.

Q. And where were you seated inside the car?

A. I was seated in the passenger seat.

Q. Why was he driving your car?

A. It was a friend of mine, and he washes and clean my car, I let him drive it.

Q. And the other person, do you know who that was that was inside of your car?

A. No, he was a friend of Johnnie Morgan.

Q. Where was he sitting?

A, He was sitting in the back seat.

Q. When you -- so you pulled into the parking lot there at Mackie's?

A. Yes.

Q. Is it called Mackie's Lounge?

A. Mackie's Lounge.

Q. Where was the car, where did the car park?

A. Car was parked just in front of the doors of the grocery section of the lounge.

Q. Is there another section of the lounge?

A. Yes, there is grocery liquor store like type area, and lounge area.

Q. Which door or doors were you parked in front of?

A. The liquor store area.

[C14]Q. How many doors are there where you were parked?

A. Well, there are two doors there.

Q. Are they right next to each other?

A. Yes, side by side.

Q. Were you parked facing those doors?

A. Yes, facing.

Q. About how far away were you seated from where those doors were?

A. About ten feet away or little more.

Q. At that time, it was dark out?

A. No, I would not say.

Q. Was it dark out, the sun had gone done?

A. Yes, sun went down already.

Q. Were there lights in the area by the doors?

A. Yes.

Q. Do you remember if those doors were open or closed?

A. Well, they are open.

Q. Now, when you pulled up in front of the doors to the liquor store area of Mackie's, did you get out of the car?

A. No, I did not get out of the car.

Q. Did Johnnie Morgan get out of the car?

A. No, he did not.

[C15]Q. Did the third person in your car get out of the car?

A. Yes, he got out of the car and went into the liquor store area.

Q. And what did you do when he went into the liquor store?

A. Well, Johnnie and I sat down in the car and we were just conversating.

Q. Did anyone come up to your car while you were seated inside the car?

A. Yes, the kid on a bicycle pulled alongside the driver's side of the door and was speaking to Johnnie Morgan.

Q. Did you know who this person was?

A. No, I did not know who he was.

Q. About how old was he?

A. He was about sixteen, seventeen years old.

Q. Was he with anyone?

A. No, he was by himself.

Q. You stated he was on a bicycle?

A. Yes, he was on a bicycle.

Q. How long did he speak to Johnnie Morgan while you were seated inside the car?

A. About three to five minutes

[C16]Q. After that three to five minutes, what happened?

A. Well, he proceeded to ride his bicycle on to the front of the car and across heading --

Q. When you say -- I just want to stop you there for a minute, on to the front of the car or the front of the car?

A. In front of the car.

Q. Now, directly in front of the car you said you were parked in front of the liquor store?

A. Yes.

Q. Is there a sidewalk outside those doors?

A. Yes, there was a sidewalk between the car and the building.

Q. Was he riding his bicycle on that sidewalk?

A. Yes, he was.

Q. As he was passing in front of the car, was he going from left to right or right to left, was he going back towards you where you were seated?

A. Yes, he was coming towards my direction.

Q. Did you watch him as he rode past on his bicycle?

A. Yes.

Q. Now, that area that you describe as the sidewalk in front of the lounge, you stated that it was lit, where [C17]did he go, did you watch where he went?

A. Well, he kept on going for another couple feet. Well, he kept on going, in that area.

Q. Now, what happened, or did anything happen as you saw him continue on down the sidewalk?

A. Well, as he was going down the sidewalk, he turn to turn around and somebody approached him.

Q. When you say he turned around, was he on the bicycle?

A. Yes, he was trying to turn around on his bicycle.

Q. Did he turn around on his bicycle?

A. Actually not, he did not.

Q. Where was he when you said he began to turn around on his bicycle in relation to the doors of the liquor store?

A. About from the door, he would be about eight feet or so away from the doors.

Q. And if you were looking at the doors, would that be to the left of the door or right of the door?

A. Well, I am not too familiar, I mean I am not too good with left or right, but he was little away from the door.

Q. You used your right hand, was he in that [C18]direction?

A. Well, I am the facing door and he was that way.

MR. DELANEY: Judge, for the record he is indicating with his right hand to his right.

THE COURT: The record will so indicate.

MR. DELANEY:

Q. Now, you said you saw someone approaching him, where was that person?

A. That person was coming from the right of me coming towards us then.

Q. Now, was that person walking, on a bicycle, driving, how was that person?

A. He was walking.

Q. Did you see if this person had anything in his hand at that time?

A. At that time I did not see anything in his hands.

Q. What happened as you saw this person approach and you saw the boy on the bike attempting to turn around on his bicycle?

A. Well, I saw that person commence to striking him with something in his hand.

Q. Could you describe what he had at that point?

A. Like a wooden stick, like a baseball bat type, [C19]baseball bat.

Q. Could you describe first of all what you saw and how you saw it?

A. Well, I saw, as the kid was turning around with his bicycle, the gentleman started hitting him in the head with the bat.

Q. Now, when you say you saw him hitting him in the head with the bat, did he have both hands on the stick or the bat that you saw?

A. No, at that time he had one hand, one hand.

Q. How many times did you see him hit the boy on the head, using one hand?

A. Well, twice actually.

Q. After he hit the boy with the bat on the head twice, what happened to the boy?

A. Well, he was coming backwards towards the building, and as he was -- after he got a first shot, he was falling backwards towards the building, and he kept falling, and then he fell into the door of the store.

Q. How far was this from where you were sitting when you saw the man hitting the boy?

A. About ten feet.

Q. Then after the boy fell into the doorway, what happened?

[C20]A. Well, he hit him one more time.

Q. Was the boy on the ground at this time?

A. He was on the ground on his bicycle.

Q. Can you describe how the person hit the boy on the bicycle when he was on the ground?

A. Well, he hit him with both hands. I mean he had both hands on the bat at the time, and it was forceful.

Q. Where did he hit the boy, what part of the boy's body?

A. Well, it would appear to me the upper part of his body then.

Q. At that point you could not tell exactly where?

A. No.

Q. Close to the head?

A. Yes, closer to the head.

Q. And this happened right at the doorway of the liquor store. Do you remember if there were lights on inside the liquor store? The liquor store was open?

A. Yes, the liquor store was open.

Q. Were lights on inside the liquor store?

A. Yes.

Q. After you saw the boy being hit while he was laying on the ground by the man using both hands, what did that man do?

[C21]A. After he hit him, he turned around and went the direction he came from.

Q. Now, that person that you saw first hit the boy on the bike twice with the baseball bat on the head while he was on his bike and then once while the boy was on the ground using both hands, do you see that person in court today?

A. Yes.

Q. Could you point that person out and identify something he is wearing in court today?

A. Well, he is sitting there in the khaki suit.

MR. DELANEY: Judge, may the record reflect the in court identification of the defendant?

THE COURT: The record will so indicate.

MR. DELANEY:

Q. Mr. Johnnie, what did you do after you saw the defendant strike the boy with the baseball bat three times and after the defendant left, what did you do?

A. Well, Johnnie and myself got out of the car, and went over. Well, we looked at the kid. He was

Q. Could you describe to the Judge what the boy looked like?

A. Well, his head was swollen.

Q. What side of his head?

[C22]A. Well, I really can't say which side, but it was swollen, bruised.

Q. Was he, could you tell if he was conscious?

A. Well, he was groaning. He never said a word. He just groaned, groaned all of the way.

Q. At the point you saw this, was he still on the ground?

A. Yes, he was still on the ground.

Q. What did you do at that point?

A. Well, other people came around, and they suggested that we take him to the hospital.

Q. What did you do?

A. Well, at the suggestion, we -- well, Johnnie insisted on taking him to the hospital, so I agreed with it more or less, and they took him to the hospital in my car.

Q. Did you go to the hospital?

A. In my car, yes.

Q. Did you ever see that defendant again that day or that evening?

A. No, I didn't see him that evening.

MR. DELANEY: May I approach the witness, Judge.

Q. Mr. Johnnie, I am going to show you what I have marked as People's Exhibit Number 3 for identification. [C23]It is a photograph. Could you tell us what that is a photograph of?

A. This is a photograph of my car.

Q. Is that the car that you and Mr. Morgan were in on September 22nd, 1999, parked in front of Mackie's?

A. Yes.

Q. Does that truly and accurately represent the way your car appeared on September 22nd of 1999?

A. Yes.

Q. Now, let me ask you one more thing about the car when you were seated inside the car, Mr. Johnnie, was your window open when you saw the defendant attack the boy on the bike?

A. Well, it was slightly cracked. It was not all the way down.

THE COURT: So it was more up than down?

THE WITNESS: More up than down.

MR. DELANEY:

Q. Mr. Johnnie, I will show you what is marked as People's Exhibit Number 4 for identification. What is that a photograph of?

A. Well, this is a photograph of Mackie's Lounge and Liquor Store.

Q. And I am going to hand you a red pen, sir. I am [C24]going to ask you to place an X at the spot where the car was parked as you sat in the car on September 22nd of 1999?

A. (Indicating)

Q. And Mr. Johnnie, I am going to ask you to place a circle at the location where you saw the defendant first strike the boy on the bike?

A. (Indicating)

Q. Can you place a circle around that, sir. I am sorry?

A. (Indicating)

MR. DELANEY: Judge, for the record, the witness has indicated with a circle around an X at that location.

THE COURT: Okay.

MR. DELANEY:

Q. Mr. Johnnie, I am showing you People's Exhibit Number 5 for identification, again what is that a photo of?

A. That is a photo of Mackie's Lounge and the liquor store.

Q. And on that photograph as well, can you place an X in the location where you were parked?

A. (Indicating)

Q. And a circle with an X at the location where you [C25]saw the defendant first hitting the victim?

A. (Indicating).

Q. Also on this photograph, sir, can you place an X over the door where you saw the victim finally, his final resting spot where you saw him?

A. Put an X --

Q. Actually you can put a circle without an X at that location.

A. (Indicating)

Q. Mr. Johnnie, do People's Exhibit Number 5 and People's Exhibit Number 6, do they truly and accurately represent the way that location at Mackie's Lounge appeared on September 22nd of 1999?

A. Yes, I would say it is.

MR. DELANEY: Judge, just to clarify the record.

Q. Mr. Johnnie, the photograph of your car, which I have marked as People's Exhibit Number 3 for identification, you marked -- or you stated that was your vehicle, People's Number 4 for identification was marked by the witness as the place he was parked and the place he first saw the defendant, and People's Number 5 was the photo that the witness marked the parked location, the location where he first saw the defendant striking the victim, and the spot where the doorway where he [C26]ultimately saw the victim.

THE COURT: Okay.

MR. DELANEY:

Q. Mr. Johnnie, you also stated that the area, there was lighting in the area where you saw this all happening, is that right?

A. Yes.

Q. Were there lights on above where you were parked?

A. Yes, there was lights.

Q. I am showing you again what I have marked as People's Exhibit Number 4 for identification?

A. Yes.

Q. Which you have identified. I would ask if you can see if those lights are depicted in that photograph?

A. Yes, they are in the photograph.

Q. I will ask you to mark with this red pen again, if you could circle those lights that you saw that are in that photograph?

A. (Indicating).

Q. As far as you know, were those lights on on September 22, 1999?

A. Well, the area was lit at the time.

Q. Now, Mr. Johnnie, you stated that you took the [C27]boy to the hospital that night with Mr. Morgan?

A. Yes.

Q. Did you later about a week later on September 28th go to the Markham Police Department?

A. Yes, sir.

Q. And at that time, did you speak to Detective White?

A. Yes.

Q. And at that time did he show you some photographs?

A. Yes.

MR. RAGO: Excuse me, counsel. What date was that?

MR. DELANEY: September 20th.

THE COURT: That is at the Markham Police Station, you said?

MR. DELANEY: Yes, Judge.

Q. Now, Mr. Johnnie, at that time, when Detective White showed you those photographs, did you see a photograph of the defendant that day?

A. Yes, a photograph of him.

Q. Did you tell Officer White that was the individual who you saw striking the boy on the bike on September 22nd?

A. Yes, I did.

[C28]Q: Mr. Johnnie, about a month later, on October 27th of 1999, did you again go to the Markham Police Department?

A. Yes.

Q. At that time again, did you speak with Detective White?

A. Yes.

Q. At that time did you view a lineup of some individuals related to this incident?

A. Yes.

Q. And did you pick an individual out of that lineup on that date?

A. Yes.

Q. And was that individual the defendant?

A. Yes.

Q. Before you viewed that lineup, did anyone tell you who the defendant was, or the defendant was there that day?

A. No.

Q. And the person that you picked out of the lineup, was that the same person that you saw striking the boy on the bike on September 22nd?

A. Yes.

MR. DELANEY: Judge, for the record I will show [C29]counsel what I have marked as People's Exhibit Number 6 for identification.

Q. Mr. Johnnie, I am showing you what I have marked as People's Exhibit Number 6 for identification. It is a photograph. Could you tell me what that is a photograph of?

A. Well, this is a photograph of the lineup that I witnessed.

Q. And did you select one of those individuals?

A. Yes, I selected one.

Q. And is that person that you selected, is that the person you that saw striking the victim on September 22nd of 1999?

A. Yes.

Q. And there are numbers over those individuals, those five individuals. Tell us which one is the defendant, the one you picked out on October 27th of 1999?

A. Number one.

Q. Does that truly and accurately represent the way that lineup appeared to you on October 27th?

A. Yes sir.

MR. DELANEY: Could I have a moment, Judge?

THE COURT: Um-hum.

4. [C30](Short pause)

MR. DELANEY: Judge, I have no further questions at this time.

CROSS EXAMINATION

BY MR. RAGO:

Q. Mr. Johnnie, did you talk to the police that night in front of Mackie's?

A. Well, we took the kid to the hospital, and then we came back to Mackie's and there was an officer there.

Q. Did you talk to that officer?

A. Johnnie spoke to the officer.

Q. Thank you. Sir, I need to ask you, please. Did you talk to the officer?

A. No, I did not talk to the officer.

Q. You just saw a young lad get beaten, correct?

A. Yes.

Q. Did you talk to the officer about what you saw?

A. No, I did not talk to the officer.

Q. You did not give the officer a description of who you saw do the beating of the child, a teenager?

A. No, I did not.

Q. Did you talk to the police at the hospital?

A. There was no police at the hospital.

Q. After you went to Mackie's, did you leave [C31]Mackie's at any time and go to the police station before September 28th in '99?

A. What is the question you asked, please?

Q. After you left Mackie's that evening after this happened, and after you say your friend talked to the police, did you ever go to the police station and talk to the police officer?

A. No, I did not.

Q. Before you ever had any contact on September 28th?

A. Tuesday, I went to the police.

Q. Thank you, that was the 28th, I believe?

A. I am not familiar with the date.

Q. Did you give the police a description of the person that you saw hitting?

A. Yes, sir.

Q. What was that description, sir?

A. It was about a male, a black male, about two hundred forty pounds, 6'2.

Q. So big and bulky, right; is that correct?

A. Well, I would say medium.

MR. RAGO: Could I approach the witness?

THE COURT: Go ahead.

MR. RAGO: During the examination, may I have [C32]continuing permission.

Q. I am going to show you again People's Exhibit number 6 for identification, sir, that you said was the people that you saw at the police station?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And when you looked at that, you picked out the biggest and the bulkiest there, correct, sir?

A. Well, he --

Q. The biggest and the bulkiest, right?

A. Yes.

Q. When you looked at these people, these five people, they were seated, correct?

A. Yes.

Q. So, you didn't go by height, is that correct?

A. No, I didn't go by height.

Q. Now, you said that your friend, who was driving your car, because of friendship, okay, you let him drive the car around, even though you were in it because he helps you with the car?

A. Yes.

Q. Had a conversation with this person for about three to five minutes, is that correct?

[C33]A. Yes, sir.

Q. What were they talking about?

MR. DELANEY: Objection, Judge, relevance.

THE COURT: Overruled.

MR. RAGO: Thank you, sir.

THE WITNESS: Well, the kid more or less was complimenting him on the -- on him driving my car, and what is happening otherwise, you know.

Q. Three to five minutes they are talking about what is happening out there on the street? Were they friends?

A. Well, the kid seemed to be an admirer of him, of Johnnie Morgan.

Q. Do you have any idea of why he held your friend in such regard?

MR. DELANEY: Objection, Judge.

THE COURT: Overruled.

MR. RAGO: Thank you.

THE WITNESS: No, I would not know why.

MR. RAGO:

Q. In fact, the teenager's first word was "what is up" ?

A. Yes.

Q. Did you see where he came from?

[C34]A. It was a crowd of -- it was a little crowd by the side of Mackie's there, and he came from that crowd it seems.

Q. So there was a crowd of people outside when this finally happened, is that correct?

A. On the left side, on the left side of Mackie's.

Q. Right, so there was a crowd of people standing out here?

A. Several people, yes.

Q. More than three our four, right?

A. About four or five.

Q. When was it that you first saw the person that you say struck this teenager as he was coming

from what we have now established from the right side; when did you first see that person?

A. Just before the incident took place. I mean like --

Q. So right in front of the building?

A. Right, right in front.

Q. And we have already established you are seated in your car in the passenger side?

A. Yes.

Q. And you are about eight feet away from the -- eight feet, three feet, how far away are you from those [C35]doors?

A. About ten, or so.

Q. And you say that the lad on the bicycle was about eight feet to your right when there was first contact between who you say struck him, this first incident?

A. No, it was about twelve feet when they first contact, I mean.

Q. So, this person is coming from your right heading towards you, is that correct?

A. Well, towards --

Q. The person who struck the young lad?

A. He was coming towards the kid.

Q. So, he is heading from your right coming closer to your right?

A. Yes.

Q. According to your testimony, his face would be heading towards you?

A. Yes.

Q. You see some incident happen, right?

A. Yes.

Q. You see this lad manage to cover that distance and end up falling in the doors?

A. Yes.

[C36]Q. So, you see both of these people supposedly, correct?

A. Yes.

Q. Traveling another ten or twelve feet where he finally falls in the doorway, is that correct?

A. Well, less than ten feet.

Q. There is a whole bunch of lights across the front of Mackie's, is that correct?

A. Yes.

Q. And to be fair to the Judge in case he doesn't know this area, it is fair to say this area is a commercial area, isn't that correct?

A. Yes.

Q. There are street lights all over the place, isn't there?

A. Yes.

Q. In fact, I think if you were to count them, there would be about twenty-two street lights that light up that area?

A. Right, I guess.

Q. So, you are able to see?

A. Yes.

Q. What you say you told us what you saw?

A. Yes.

[C37]Q. There were no shadows and people hiding in the shadows, is that correct?

A. No.

Q. So, you are trying to tell us what you saw and who did it was based upon what you saw out there because of the lights?

A. Yes.

Q. And those lights are right along the front of that building of Mackie's, is that correct?

A. Yes.

Q. It is like six or seven of them, is that correct?

A. Yes.

Q. Now, you said that you saw some photographs at the police station, is that correct?

A. Yes.

Q. How many photographs were shown to you at that time?

A. How many photographs were shown to me?

Q. I will be fair to you. I will not knit pick, I am just going to say approximately how many photographs were shown to you, a handful, a dozen, a book, just a a couple, how many were shown to you, sir, do you remember?

A. Well, they showed me a book at one time. They [C38]showed me a book.

Q. And was that after you told the police a description of this person that you saw out there?

A. Yes, this was after I gave a description.

Q. And the description you gave was approximately two hundred forty pounds and around 6'2, is that correct?

A. Yes.

Q. When you went to this lineup and you looked at these five people seated in front of you, sir, were all five of these people part of the photographs that were shown you the first time you went to the police station?

A. No.

Q. Only one person was the same?

A. Yes.

Q. And you remembered that, that there was one person from the photographs and there was one person in the lineup, right, and you remembered that?

A. Yes.

MR. RAGO: If I may have just a moment, please, Judge.

THE COURT: Okay.

5. (Short pause)

MR. RAGO:

Q. Now, sir, you spoke of your coming to Mackie's [C39]with your friend driving, correct?

A. Yes.

Q. And then you tell us you took the teenager to the hospital, and you went back to Mackie's?

A. Yes.

Q. Why did you go back to Mackie's?

A. Well, Johnnie Morgan was driving, and it was he was decided to go to Mackie's.

Q. It is your car?

A. Yes.

Q. Why did you go back to Mackie's?

A. Well, I don't know why he went back to Mackie's.

Q. Mackie's is a source of liquor, is that correct?

A. Yes.

Q. Did you guys drink?

A. Yes, we do drink.

Q. More than just a couple?

MR. DELANEY: Objection, Judge, as to relevancy, at what point.

THE COURT: Let's get into the specific day.

MR. RAGO: I will.

Q. That evening before you went to Mackie's that evening, did you have anything to drink?

A. No.

[C40]Q. No drink at all?

A. Well, actually the third person in the car we had left him at Mackie's, and I can't remember. He was not there when we came back to Mackie's.

Q. I understand that, sir. Now we are getting to the drinking issues. I understand that this friend, who was a friend of your friend, Johnnie, left the vehicle, I understand that.

A. Yes.

Q. That day, had you done any drinking at all?

A. No, I did not.

Q. Were you going to Mackie's with your friend intending to get drinks?

MR. DELANEY: Objection, Judge, relevancy.

MR. RAGO: It is cross examination, Judge.

THE COURT: Overruled.

MR. RAGO: Thank you.

THE WITNESS: I do not know what he went into Mackie's to get.

MR. RAGO:

Q. I am asking about you, sir.

A. No, I did not go do Mackie's to get drinks.

Q. Did you go there for any other reason?

A. No, I was just in the car with Johnnie.

[C41]Q. When Johnnie drove you back to Mackie's while you guys were heading out away from the hospital, did he tell you where you were going; did you guys talk about where you were going to head to?

A. Yes, he said we were going back there to -- we were going to go back to Mackie's because he --

Q. Is that where you wanted to go, as well?

A. Not really.

Q. Now, sir, this hospital trip, your friend insisted that you help and use your car to take this teenager to the hospital, right?

A. Yes.

Q. So you guys went to the hospital, right?

A. Yes.

Q. You basically dropped him off there and took off, right; you left, is that correct?

A. Yes.

Q. Didn't talk to the nursing staff or emergency room staff people, did you?

A. Johnnie spoke to them.

Q. You didn't?

A. I did not.

Q. And as soon as Johnnie dropped off inside -- because I think you stood outside the door, right?

[C42]A. Yes.

Q. You guys hopped in the car and you took off, right; you left?

A. Yes.

Q. Didn't wait to see if the police would come, correct?

A. Well, the police had pulled up the same time.

Q. So, the police were at the hospital?

A. Well, he pulled up and Johnnie hollered at the policeman.

Q. This is at the hospital now?

A. Yes.

Q. You talked to that police officer, right, about what you say?

A. We did not get out of the car. He pulled up --

Q. Did you talk to the police officer?

A. No, I did not speak to the police.

Q. You stayed in the car, right?

A. We both stayed in the car.

Q. Thank you. You played deaf and dumb, didn't tell the police --

MR. DELANEY: Objection, Judge.

MR. RAGO: Correct.

THE COURT: Sustained.

[C43]THE WITNESS: What is that?

MR. RAGO: I apologize. I will withdraw that.

THE WITNESS: What is that?

MR. RAGO: Thank you, sir. I will withdraw that.

THE COURT: Never mind, don't pay any attention to it.

MR. RAGO:

Q. You didn't get out of the car and talk to the police officer, correct?

A. No, he did not.

Q. Did you tell the police officers you were the guys that brought this person into the hospital?

A. Johnnie told the policeman that.

Q. Were you there when he said that?

A. Yes, I was there.

Q. Did Johnnie holler it out from the car?

A. Yes, sir.

Q. Did the police officer tell you guys to stay and wait?

A. No, he did not.

Q. You guys took off?

A. Yes.

MR. RAGO: Nothing further, Judge. Thank you.

[C44]REDIRECT EXAMINATION

BY MR. DELANEY:

Q. Mr. Johnnie, you saw the defendant's face at Mackie's on September 22nd?

A. Yes.

Q. And you got chance to look at him, right?

A. Yes.

Q. What period of time were you able to look at him on September 22, 1999?

A. As he turned away from the kid and was walking away.

Q. You saw him coming up, also?

A. Yes, I saw him coming up.

Q. What period of time would you say you were able to look at him and see him?

A. Well, mostly I got a good look at him when he turned from the kid and walked away.

Q. When he was about eight feet from away from you?

A. Yes.

Q. And you saw his face?

A. Yes.

Q. And when you looked at the photographs that Officer White showed you on September 28th, six days later, you saw a picture of his face, is that correct?

[C45]A. Yes.

Q. And the lineup that you saw, you saw his face, is that correct?

A. Yes.

Q. And you picked him out as that individual who you saw striking the victim on September 22nd, is that right?

A. Yes.

Q. Now, just six days later when the police contacted you, you went to the police station, right?

A. Yes.

Q. You had no problem doing that, did you?

A. No.

Q. And on October 22nd when they contacted you again, you went there willingly, is that right?

A. Yes.

MR. DELANEY: I have no other questions, Judge.

RECROSS EXAMINATION

BY MR. RAGO:

Q. The police had to contact you?

A. Yes, they came to my house.

Q. You never called them?

A. I went to the police station.

Q. During the time of the incident, the first time [C46]you went to the Markham Police Department because police contacted you, did you ever call the police and tell them that you saw what you say you saw out there in front of Mackie's?

A. After we left the hospital, and we came back to Mackie's, we told the police that we saw what happened.

Q. Now, it is we. You also talked to the police?

A. No, Johnnie told the police that.

Q. Please, we will keep this to you, because if you were not next to Johnnie while he is talking to the police, you cannot tell what the heck Johnnie may or may not have said. Did you, did you talk to the police at that time?

A. No, I did not.

Q. Did you talk to the police at any time; call, do whatever it is, go to the police?

A. No.

Q. Tell them anything about you having seen as well what you say you saw?

A. No.

MR. RAGO: Nothing further, Judge.

FURTHER EXAMINATION REDIRECT

BY MR. DELANEY:

Q. Mr. Johnnie, you did tell them on September [C47]28th, is that right?

A. Yes, sir.

MR. DELANEY: I have no further questions.

THE COURT: Anything else

MR. RAGO: No.

THE COURT: What is your dialect?

THE WITNESS: I am from the Caribbean, actually.

THE COURT: Which island?

THE WITNESS: Well, I was born in Carrsale, and I grew up State Vincent, West Indies.

THE COURT: How long have you lived in the United States?

THE WITNESS: Since 1982.

THE COURT: Anything else?

MR. DELANEY: No, Judge.

THE COURT: Okay, thank you. You may be excused.

6. (Witness excused)

THE COURT: Do you want to call another witness now, or do you need a break?

MR. GOLDEN: It is up to you

THE COURT: We will take a five minute break.

(WHEREUPON said matter was recessed, after which the following proceedings were had, to-wit:)

[C48]THE COURT: Do you want to call your next witness?

MR. GOLDEN: Judge, I believe at this time we will proceed by way of stipulation that if Officer Alexander were called to testify, he would testify in the same manner that he did at the hearing before Your Honor on April 10th of the year 2000, for the motion to quash arrest, and I would submit a copy of that transcript. His testimony is pages 26 through 37. That would be People's Exhibit 7.

MR. RAGO: And the relevant cross examination, Judge.

MR. GOLDEN: Of course.

THE COURT: Do you want to call another witness?

MR. DELANEY: Yes, Judge. The State will call Detective Sergeant White.

7. (Witness sworn)

THE COURT: Have a seat, officer.

DETECTIVE SERGEANT WHITE,

called as a witness herein, on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DELANEY:

Q. Sergeant, could you state your name for the record, please?

[C49]A. Terry White.

Q. And where do you work, sergeant?

A. Markham Police Department.

Q. And currently you are a detective sergeant there?

A. That is correct.

Q. How long have you worked for the Markham Police Department?

A. Coming up on ten years.

Q. You have been a sergeant for how long?

A. Approximately four years.

Q. And a detective for how long?

A. Seven years.

Q. Sergeant, on September 22nd of 1999, were you assigned what I guess at that point was an aggravated battery or aggravated assault, which occurred at Mackie's Lounge on the evening of the 22nd of September?

A. Yes.

Q. Now, as part of that investigation, did you interview a man by the name of Maurice Johnnie?

A. Yes.

Q. And did that interview take place on September 28th?

A. Yes, it did.

[C50]Q. Were you provided with a description by Mr. Johnnie at that time?

A. Yes, I was.

Q. Now, after you he gave you a description of the individual that was involved in this incident, what did you do?

A. I put together what we call a photo lineup.

Q. Would you describe how you did that?

A. It is just compiling a series of arrest photos.

Q. Now, the photos that you used were based on what?

A. Arrests, and the description that Mr. Johnnie gave.

Q. How many photos did you ultimately use in the photo lineup that Mr. Johnnie looked at?

A. Six.

Q. Of those individuals, did Mr. Johnnie select one?

A. Yes, he did.

Q. And who did he select in that photo array?

A. Mr. Owens

Q. Now, do you know Mr. Owens?

A. Yes, I do

Q. Is he in court today?

[C51]A. Yes, he is.

Q. Would you point him out and identify something that he is wearing?

MR. RAGO: Judge, stipulation this officer will identify my client.

THE COURT: Stipulation the witness has identified Mr. Owens.

MR. DELANEY:

Q. Now, prior to Mr. Johnnie's selection of the defendant in that photo array, did you indicate to him that he would be in that photo array?

A. No.

Q. Did you make any other suggestive remarks about anyone in that photo array?

A. No, I didn't.

MR. DELANEY: May I approach the sergeant, Judge?

THE COURT: Go ahead.

MR. DELANEY:

Q. Sergeant, I am showing you what has been marked as People's Exhibit Number 8 for identification. Do you recognize what that is?

A. Yes, I do.

Q. What is that?

A. This is the photo lineup that I used.

[C52]Q. Did Mr. Johnnie view that photo lineup?

A. Yes, he did.

Q. Did he select an individual in that photo lineup, which he stated was the individual he saw striking the victim at Mackie's Lounge on the 22nd of September?

A. Yes.

MR. RAGO: Excuse me a minute. Before the answer is tendered, could I have a moment.

8. (Short pause.)

MR. RAGO: Thank you, Judge. I apologize for the delay, but I do have an objection at this time. If we need to be heard, Judge, I would ask it be done outside of the hearing of the witness.

THE COURT: What is your objection?

MR. RAGO: It will be a hearsay basis, but there is an additional aspect.

THE COURT: We will go -- sorry, why don't you step back there.

9. (Witness excused from the courtroom)

MR. RAGO: It would be under People versus Williams at this time. It is hearsay for this officer to suggest or indicate that someone else may or may

not have done an identification of anybody here, or point to anybody. [C53]This is the first time this exhibit has been identified and used in this court. It was not tendered to Mr. Johnnie, and to elicit testimony from this officer regarding either assertive conduct or any indication that Mr. Johnnie did anything in order to suggest or do an identification is inappropriate at this time.

THE COURT: Were you tendered that in discovery?

MR. RAGO: As far as discovery, that is not the issue. This was not used with Mr. Johnnie, People's Exhibit Number 8 for identification. It was not used. So Mr. Johnnie elicited no testimony at all regarding this array.

THE COURT: Correct.

MR. RAGO: In fact, Mr. Johnnie's testimony deals with another issue, not with these six photographs in People's Exhibit Number 8 for identification. So, this officer should not testify as to what Mr. Johnnie may or may not have done with People's Exhibit Number 8.

MR. DELANEY: Judge, it is our position that in fact that it is an exception to the hearsay rule, whether it was tendered to Mr. Johnnie or not has no bearing if the officer can testify. It is an exception to the hearsay rule of an out of court identification.

THE COURT: Okay, based on the arguments, I am going [C54]to overrule your objection. Okay, call the officer back.

10. (Witness resumes the stand.)

MR. DELANEY: Could I continue, Judge?

THE COURT: Go ahead.

MR. DELANEY:

Q. Sergeant, again, you have looked at People's Exhibit Number 8 for identification, and you stated that was the photo array you showed Mr. Johnnie on September 28th.

Is the individual he selected as the person that he saw on September 22nd at Mackie's Lounge in that photo array?

A. Yes, he is.

Q. Would you tell the Court the number of that individual?

A. Number four.

Q. And who is number four?

A. Lawrence Owens.

Q. Is that, People's Exhibit Number 8 for identification, is that in the same or substantially

the same condition as it was when you presented it to Mr. Johnnie on September 28th, 1999?

A. Yes.

Q. Sergeant, sometime after Mr. Johnnie picked out [C55]the defendant in that photo array, did you learn that the defendant was arrested?

A. Yes.

Q. Now, would that have been on October 26th of 1999?

A. That is correct.

Q. Now, did you contact -- again contact Mr. Johnnie on October 27th of 1999?

A. Yes.

Q. For what purpose?

A. To view a physical lineup.

Q. And can you explain to the Court what you did and how you did it in relation to the lineup?

A. That is a matter of gathering individuals with similar physical characteristics to Mr. Owens, and placing them in an actual physical lineup so that witnesses can view them.

Q. And did you do that?

A. Yes.

Q. How many individuals did you get together for that?

A. It should have been probably five in total.

Q. Before Mr. Johnnie viewed the lineup, did you give any indication or suggestion to him who was in the [C56]lineup?

A. No.

Q. Did Mr. Johnnie view the lineup?

A. Yes, he did.

Q. Was the defendant in that lineup?

A. Yes, he was.

Q. Did Mr. Johnnie select an individual in the lineup?

A. Yes, he did.

Q. Did he tell you that was the person he saw swinging the bat at the boy on the bike at Mackie's Lounge?

A. Yes, he did.

Q. Who did he select out of that lineup?

A. Mr. Owens.

MR. DELANEY: Judge, I will again show counsel People's Number 6 for identification.

Q. Sergeant, showing you People's Exhibit Number 6 for identification, do you recognize what that is?

A. Yes, I do.

Q. What is this?

A. It is a picture of the physical lineup.

Q. Is that the one, the lineup that Mr. Johnnie viewed on October 27th of 1999?

[C57]A. Yes, it is.

Q. Now, is the individual he stated that he saw striking the victim on September 22nd present in that lineup?

A. Yes, he is.

Q. Who did Mr. Johnnie select as that person?

A. Number one.

Q. And who is number one?

A. Mr. Owens.

Q. And does that photo truly and accurately represent the way the lineup appeared that Mr. Johnnie viewed on October 27th of 1999?

A. Yes, it does.

Q. Now, sergeant, did anyone else view that lineup?

A. Yes, they did.

Q. Who else viewed that lineup?

A. Another witness.

Q. And who was that?

A. William Evans.

Q. At the time -- was that the same day that Mr. Johnnie viewed the lineup?

A. That was the same day.

Q. Were they, did they view the lineup together?

A. No.

[C58]Q. Before Mr. Williams viewed the lineup, did you make any suggestions to him who was in the lineup?

A. No.

Q. Did you tell him that Lawrence Owens was going to be in the lineup?

A. No, I didn't.

Q. Were you present when Mr. Williams viewed the lineup?

A. Yes, I was.

MR. RAGO: I am sorry to interrupt. It should be Mr. Evans.

MR. DELANEY: Pardon me.

Q. Were you present when Mr. Evans viewed the lineup?

A. Yes, I was.

Q. Who did he select in that lineup?

A. Mr. Owens.

Q. Was Mr. Owens positioned in the same way as he was as when Mr. Johnnie viewed the lineup?

A. Yes, the exact same position.

Q. Did Mr. Evans indicate to you that the defendant was the individual he saw at Mackie's Lounge with the bat striking the boy on the bike on September 22nd?

A. Yes, he did.

[C59]Q. Did Mr. Evans also view the photo array?

A. Yes, he did.

Q. Do you remember when that was?

A. The same day that Mr. Johnnie viewed it.

Q. Who did he select from the photo array?

A. Mr. Owens.

Q. Were any suggestions or indications made to him about Mr. Owens being in that photo array?

A. No.

Q. Who did he select in the photo array?

A. Mr. Owens.

Q. Did the photo array appear as it did when I showed it to you as in People's Exhibit Number 8?

A. Yes.

MR. DELANEY: No further questions, Judge.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. RAGO:

Q. Detective White, you chose people that had a general physical build of approximately two hundred forty pounds, is that correct?

A. Yes.

Q. For purposes of the photo array?

A. Yes.

[C60]Q. Correct?

A. Yes, pretty much.

Q. And in similar manner, again because you are fair, for the lineup you also tried to pick some people approximating two hundred forty some old pounds?

A. Best I could.

Q. And the other characteristic you were looking for was approximately six foot two, correct?

A. More or less the facial hair more.

Q. You didn't go by height?

A. We tried to stick with the height, also.

Q. And the height was provided by Mr. Johnnie, correct?

A. Yes, that is correct.

Q. Six foot two?

A. Yes.

Q. Yet during the lineup procedure itself you had all five people seated, is that correct?

A. Yes, we did.

Q. Now, the six people that you had in the photo array, that being People's Number 8 -- and Judge. I

will go through this examination without prejudice to the points I made and the objections I made during side bar.

THE COURT: Fine.

[C61]MR. RAGO: If the Court will accept that, please. Based upon the law of the case I have to explore the issue.

Q. The six people that are depicted in People's Exhibit Number 8 for identification, the six photo array, correct?

A. Yes.

Q. You didn't use those people for the lineup, did you?

A. No.

Q. You chose other people, correct?

A. Yes.

Q. So, the only one that was depicted in both the photo array as well as the lineup was my client, Mr. Owens?

A. That is correct.

MR. RAGO: Thank you. No further questions, Judge.

THE COURT: Do you have anything else?

MR. DELANEY: No further questions.

THE COURT: Thank you. You may be excused.

11. (Witness excused)

THE COURT: We will take a lunch break now.

12. (WHICH matter was recessed for lunch.)

[C62]

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS	)	Indictment No. 99 CR 25287
VS	)	Before Judge JOSEPH
LARRY OWENS	)	MACELLAIO
	)	Wednesday, November 8, 2000, PM
	)	Bench Trial

APPEARANCES:

III.HON. RICHARD A. DEVINE, State's Attorney of Cook County, by MESSRS. MICHAEL GOLDEN and WILLIAM DELANEY, Assistant State's Attorneys, appeared for the People;

IV.MS. RITA A. FRY, Public Defender of Cook County, by MESSRS. FRANK RAGO and JOHN WILSON, Assistant Public Defenders, appeared for the Defendant.

REPORTED BY
Cherylyn D. Thompson, CSR, RPR, 084-001143
Official Court Reporter
16501 South Kedzie Parkway

[C63]THE CLERK: Larry Owens. State, ready to call another witness?

MR. GOLDEN: Yes, Judge. The People would call William Evans.

13. (Witness sworn)

THE COURT: Have a seat.

WILLIAM EVANS,

called as a witness herein, on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GOLDEN:

Q. Sir, I am going to ask you to speak up loudly and identify yourself to the court reporter, spelling your name?

A. W-i-l-l-i-a-m -- my name is William Evans, W-i-l-l-a-m, E-v-a-n-s.

Q. And Mr. Evans, how old are you?

A. Forty-five.

THE COURT: Twenty-five?

THE WITNESS: Forty-five.

THE COURT: Forty-five.

MR. GOLDEN:

Q. Mr. Evans, you are currently in the Cook County [C64]Department of Corrections, is that correct?

A. That is correct.

Q. And that is because you were charged with possession of a controlled substance with intent to deliver under case number 99 C6 61825?

A. Yes, that is correct.

Q. And that happened in November of 1999, correct?

A. Yes.

Q. And in addition, you are currently on probation under case number 99 C6 60008, is that correct?

A. Yes.

Q. And that was for delivery of controlled substance?

A. Yes.

Q. Now, prior to your testimony today, you met with myself and your own attorney, correct?

A. Yes.

Q. And in exchange for your truthful testimony in this case, we have agreed to recommend a sentence of probation on the new case for a charge of possession of controlled substance, correct?

A. Yes.

Q. And to re-commit you to probation on your old case, correct?

[C65]A. Correct.

Q. And that was a sentencing recommendation that we will make to the Judge in exchange for your truthful testimony, is that correct?

A. Yes.

Q. Mr. Evans, I would like to direct your attention to September 22, 1999, in the evening hours, where were you?

A. At Mackie's Food and Liquors on 159th and Dixie Highway.

Q. That is in?

A. Harvey.

Q. That is Harvey?

A. Markham, because it is the Markham Police that patrol there.

Q. Where at, where were you at Mackie's, what part of the building?

A. On the lounge end of the corner, which is like the south --

MR. WILSON: Excuse me, Your Honor. Could you ask the witness to speak up.

THE COURT: Keep your voice up. If you sit over so your voice is not blocked.

THE WITNESS: It was at the corner, at the far corner [C66]where the lounge is at.

MR. GOLDEN:

Q. Is that the corner that is closest to Dixie Highway?

A. Yes.

Q. And approximately, shortly after 8:00 o'clock, did you see anybody there that you knew?

A. Yes, sir.

Q. Who did you see?

A. Kermit. His nickname is Kermit.

Q. Do you know Kermit's real name?

A. No, we just called him Kermit.

MR. GOLDEN: May I approach, Your Honor?

THE COURT: Go ahead.

MR. GOLDEN:

Q. Showing you what I have previously marked as People's Exhibit Number 1, do you recognize who is in that picture?

A. That is Kermit.

Q. When you saw Kermit at Mackie's Lounge that light, what was he doing?

A. He was -- first he was walking around. Then later on he had got on a little twenty inch small bike.

Q. Did you talk with Kermit that night?

[C67]A. Yes, we were laughing and joking.

Q. Where were you at when you were talking with him?

A. I was still on that corner.

Q. How long did you talk with him?

A. About anywhere from half hour maybe to an hour because he was riding around.

Q. After he left you, did you see where he went?

A. He was in front of the two double doors that goes into the entrance of the liquor store.

Q. What was he doing there?

A. He was sitting on the bike.

Q. Was there anybody else around him at that time?

A. After the two guys that approached and was talking to him.

Q. Did you see anybody in the car that Kermit was talking to?

A. No.

Q. And what happened after you saw Kermit talking with these two guys?

A. At that time I was getting ready to get my bucket to go wash a car and I heard something sound like some wood had split.

Q. Let me stop you and back up. The two guys that [C68]you said you saw him talking to, when is the first time that you saw those two guys that night?

A. When they came to the store.

Q. Did you see where they came from?

A. They came from the north, from the south, from the north end going south.

Q. Is that by --

A. On the Dixie Highway side.

Q. Right by where you were standing?

A. Yes.

Q. What was the lighting like?

A. It was just a little bit after dark, but it was not really dark yet.

Q. Was there a street light and other lights on at that time?

A. They normally cut the liquor store lights on around the store.

Q. Were you able to see the faces of those people?

A. Yes.

Q. Did you recognize either one of them?

A. Yes.

Q. And how did you recognize them?

A. From previous times being around by the store. I didn't really know them by name.

[C69]Q. But you recognized their faces?

A. Yes.

Q. Do you see either one of those people in court here today?

A. Yes.

Q. Would you point to him and identify him by an article of clothing?

A. The guy in the DOC uniform.

MR. GOLDEN: May the record reflect an in court identification of the defendant?

THE COURT: The record will so reflect.

MR. GOLDEN:

Q. When you saw the defendant, did he have anything in his hand?

A. He had a baseball bat.

Q. And where did he go as he came from the north to the south by Mackie's?

A. To the doorway where Kermit was at.

Q. And did you see what happened when he went to the doorway where Kermit was at?

A. They was talking to him.

Q. What were you doing when they were talking?

A. I was in the process of getting ready to get my bucket.

[C70]Q. When you say get your bucket, what do you mean?

A. A five gallon bucket that I wash cars with.

Q. So, you keep a bucket around with cleaning materials?

A. Yes.

Q. Where did you keep that bucket at?

A. On the north corner by the garbage can.

Q. When you went to get your bucket, what if anything happened?

A. I heard a sound like some wood was being split or broken. Then when I looked back, I saw Kermit getting hit with the bat.

Q. When you looked back, where was Kermit?

A. At the entrance door.

Q. Was he still on his bike?

A. When I saw him he was laying down half in the store and half out of the store.

Q. Where was the bike?

A. It was like he was still on it, but it was laying down.

Q. Was there anybody standing over him at that time?

A. Yes.

Q. Who?

[C71]A. No, at that time, the guys had ran, they had left.

Q. Did you see anybody hit Kermit?

A. Yes.

Q. Who did you see hit Kermit?

A. The guy right there with the DOC uniform on.

MR. GOLDEN: May the record reflect an in court identification of the defendant?

THE COURT: The record will so reflect.

MR. GOLDEN:

Q. When you saw the defendant hit Kermit, what did he use to hit him?

A. The bat.

Q. Could you tell how many hands he had on the bat?

A. I really could not see because his back was turned.

Q. Could you tell what part of Kermit's body the defendant hit?

A. Head blows.

Q. How many times did you see him hit?

A. Twice.

Q. Hit in the head with the bad?

A. Two times.

Q. When you saw him, Kermit was already laying on [C72]the ground?

A. Yes.

Q. What happened after the last time you saw the defendant hit Kermit?

A. I hollered hey, what is going on, and they took off running.

Q. Which way did they run?

A. North going back to Dixie Highway from the direction they came.

Q. So, they came back towards Dixie Highway, correct?

A. Yes.

Q. And then they went --

A. Down --

Q. Northbound?

A. Down Dixie.

Q. And they ran past you again?

A. Right.

Q. Were you able to see his face as he ran past you?

A. At that time I was going to try to see what was happening with Kermit.

Q. Directing your attention to September 28th, did you go to the Markham Police Department?

[C73]A. Yes, I did.

Q. Did you view a photo array?

A. Yes.

Q. Did you pick anybody out in that photo array?

A. Yes, I did.

MR. GOLDEN: May I approach, Judge?

THE COURT: Go ahead.

MR. GOLDEN:

Q. I show you what I have marked as People's Exhibit 8, do you recognize that?

A. Yes, I do.

Q. What is that?

A. That is photo I picked out.

Q. That is the photo array that you viewed?

A. Yes, sir.

Q. And what number did you pick out?

A. The second one.

Q. Which one?

A. The second one.

Q. When you say the second one, what number is underneath?

A. Two.

Q. Directing your attention to October 27th, did you again go to the Markham Police Department?

[C74]A. Yes.

Q. And did you view a physical lineup at that time?

A. Yes, I did.

Q. I show you what has previously been marked as People's Exhibit Number 6, do you recognize that?

A. Yes, I do.

Q. And what is that?

A. That was the lineup picture.

Q. Did you pick anybody out of that lineup?

A. With the picture facing me, the first one on the left.

Q. Is there a number above that?

A. One.

Q. And the person you picked out, number one, that is the person that you saw hitting Kermit with the bat in the head?

A. Yes, it was.

Q. Let me back up a little bit, Mr. Evans. When the defendant ran past you after he had hit Kermit, what did you do?

A. I went to see what happened, see what was wrong with Kermit, see what kind of shape he was in.

Q. What did you do?

A. He was laying in the middle of the door shaking, [C75]trembling like.

Q. Was he able to speak?

A. No, he couldn't.

Q. What did you do?

A. I picked him up, because the other fellows was there and they said they said they was going to take him to the hospital, so I helped pick him up and put him in the car.

Q. And what happened after you put him in the car?

A. They drove off, and said don't go no where, that they will be back.

Q. Had you seen those people in the car, had you seen that car there before?

A. Not to my knowledge, I don't remember seeing it.

Q. But the car was there when you went up and saw Kermit?

A. Yes.

Q. You didn't see the car drive up at the time this attack happened?

A. No, I didn't.

Q. Mr. Evans, I will show you what I have marked as People's Exhibit Number 9, do you recognize that?

A. That is the liquor store.

Q. Does that fairly depict the way the liquor store [C76]looked on that night?

A. It was not that bright.

Q. But the layout of the liquor store?

A. Yes, that is.

Q. I would like to you use this pen at put an X where it is that you saw Kermit laying?

A. (Indicating).

Q. I will show you People's Exhibit 10, do you recognize that?

A. That is the side view of the liquor store.

Q. That is the side showing --

A. Dixie Highway.

Q. And is that the side that you were standing on?

A. That is side I was on.

Q. Would you use that same pen and mark an X approximately where you were standing when you were getting your bucket?

A. (Indicating)

Q. That place where you marked the X, that is the place you were standing when you heard the wood breaking?

A. That is where I was at.

MR. GOLDEN: Nothing further.

THE COURT: Cross examination.

MR. RAGO: If I may have a moment with opposing [C77]counsel?

THE COURT: Sure.

14. (Short pause)

CROSS EXAMINATION

BY MR. RAGO:

Q. What gang are you with?

A. None.

Q. None?

A. No, sir.

Q. Never involved?

A. No.

Q. The gentleman on the bicycle, not one of your associates, is he?

A. I just know him from the neighborhood.

Q. Just a neighborhood acquaintance by face, and you are at that northeast corner of the property, Mackie's, is that correct?

A. That is correct.

Q. So that is the side closest to Dixie Highway, right?

A. Right.

MR. RAGO: May I approach?

THE COURT: Go ahead.

MR. RAGO: Thank you. May I have continuing [C78]permission, Judge?

THE COURT: Um hum

MR. RAGO:

Q. I will show you again People's Exhibit 10 for identification, which the State showed you when you were giving your story on direct examination, right?

A. Yes.

Q. That X is at the northeasterly corner, correct?

A. Correct.

Q. And the northeast corner on the far lefthand side is the side that faces southeast, correct?

A. This faces southeast.

Q. So it faces towards the corner of Dixie and 159th, is that right, and this large side of this building is the side that mostly faces towards Dixie?

A. Yes.

Q. And you had already gone around the corner?

A. There is a garbage can sits here. My bucket sitting right next to it. All I have to do is just reach over there and get it.

Q. And you didn't curl your body around, you actually went around the corner to get your bucket?

A. No, I reached for my bucket.

Q. Did you curl your body around the corner, sir, [C79]or did you do an agile act, which was to go around an obstacle and pick up your bucket?

A. No, all I had to do was reach over to get the bucket.

Q. Around the garbage can?

A. Yes.

Q. Two people came from that area, from the northerly area walking southerly, correct according to your story?

A. Correct.

Q. According to you, not one, but two?

A. Yes.

Q. We are clear on that?

A. Yes.

Q. You supposedly say you see a guy with a bat, right?

A. I did see a guy with a bat.

Q. When you saw this person with a bat, of course you said nothing, is that correct?

A. I didn't know what they was going to do.

Q. So, you certainly didn't have to worry about yourself, is that what are telling us?

A. I didn't have to worry about me.

Q. And supposedly this person you see with the bat [C80]is not a young kid with a baseball bat apparently coming back from a ball game, right?

A. It was not a young kid.

Q. It was not a kid. It was an adult with a bat?

A. Yes.

Q. You never saw this car parked directly in front of Mackie's two entranceways, is that correct?

A. I didn't see the car until we were putting him into the car.

Q. And you had first seen this young had with the bicycle at the north end of Mackie's, not the south end with the group of people, is that correct?

A. Correct.

Q. Did you talk to the police that night after this young lad had been struck?

A. I spoke to them briefly.

Q. Who did you talk to?

A. I don't know the officer's name.

Q. You don't know the officer's name?

A. I know his face when I see him. He works for Markham.

Q. Did you tell that officer what you saw?

A. Yes, I did.

Q. Did you give a description of the guy that is [C81]supposedly welding the bat and hitting the seventeen years old?

A. They just took off when looking for him. I told them which direction they went to and he went down the street.

Q. What did you tell the police officer about the physical description of the person welding the bat according to your story?

A. They didn't ask me for no physical description.

THE COURT: I can't hear you.

THE WITNESS: They didn't ask me for a description.

MR. RAGO:

Q. Who were the police going to go find, if you didn't tell them what he looked like?

MR. GOLDEN: Objection, argumentative.

THE COURT: It is argumentative. Rephrase the question.

MR. RAGO:

Q. Did you tell them how tall the guy might have been?

A. Yes.

Q. Pardon me?

A. I told him he was a little taller than me, and the other one was about my size, my height.

[C82]Q. About your height?

A. The other one. It was two. One tall and one about my height.

Q. How tall are you for this record?

A. 5'9.

Q. So, the other person was about your size, right? The other person was taller than you are?

A. One was taller and one was about my height.

Q. Did you tell them how that person was dressed?

A. They didn't ask me how he was dressed.

Q. Did you tell them about his face?

A. No.

Q. Did you tell them that you knew the guy from the neighborhood?

A. Yes, I said I know him from seeing him around.

Q. Now, you are getting a deal from the State's Attorney's Office, meaning that they are going to

make a recommendation regarding a sentence on you, is that correct?

A. Yes.

Q. You know what you are facing, right?

A. Yes.

Q. You know that you were placed on probation once, right?

[C83]A. Right.

Q. You have a delivery charge in your background, right?

A. Yes, I do.

Q. And what are the charges that you are facing now?

A. Possession.

Q. That is what they are going to kick --

A. Possession with intent to deliver. Reduced to possession.

Q. With intent while you were on probation, right?

A. Yes.

Q. Now, we are in front of the Judge so I will go through this real quickly. You signed that you were

not going to break any laws, right? Now, you have got charged again with having drugs on your body to sell, right?

A. Right.

Q. You know you are facing the penitentiary, right?

A. Yes, yes, I do.

Q. Unless you cut a deal, right? If you don't cut a deal, you are facing the pen, do we agree?

A. I understand.

Q. Do we agree?

[C84]A. Yes.

Q. Now, when you got to talk to these fine gentlemen -- and Judge, for the record I am not casting aspersions on them at all when I pursue this line of questioning. When you talked to these two fine gentlemen, the first and only thing in your mind was we are going to make a deal or I am shutting up, right?

A. No.

Q. You would not talk to them unless you got a deal, right?

A. I talked to them before.

Q. You talked to them in the presence of your lawyer, correct?

A. Correct.

Q. And you were not going to do anything unless and until you got a deal, right?

MR. GOLDEN: Objection.

THE COURT: Overruled.

MR. RAGO:

Q. Correct?

A. No.

Q. So, you were going to give it up to them, right?

A. Yes.

Q. And it is for your "truthful testimony", right?

[C85]A. Right.

Q. Now, these State's Attorneys were not out there that night, right?

A. Right.

Q. They were not with you, so they don't where you were, when you were, correct?

A. Correct.

Q. They don't know what you saw and didn't see, right?

A. Right.

Q. So, as long as the story kind of holds together, they can't tell if it is truthful or not, right?

A. But it is the truth.

Q. Thank you. We appreciate that you wanted to tell us that. Now answer my question. They don't know whether it is true or not, do they?

MR. GOLDEN: Objection.

THE COURT: Overruled.

THE WITNESS: It is the truth.

MR. RAGO:

Q. Do they know?

A. No.

Q. You are the one that is going to tell them what the truth is, right, sir?

[C86]A. Right.

Q. So, what you say is what they have got to go by, right?

A. Right.

Q. So, if you tell them that it is two people, they have to hear it, correct?

A. Correct.

Q. September 28th, you went to the police station, correct?

A. Correct.

Q. October 29th, 1999, you went to the Grand Jury, right?

A. Right.

Q. You were sworn under oath, correct?

A. Correct.

Q. And you were told to testify truthfully at that point, right?

A. Yes.

Q. And in the same fashion when you signed your probation papers, it was your word that you were going to do the right thing, right; the same thing with the Grand Jury, you were told to tell the truth, right?

A. Right.

Q. And in fact, didn't you tell those Grand Jurors [C87]that you next time you saw Kermit he was on the ground, isn't that correct?

A. Correct.

Q. And as far as these two people leaving, you told that Grand Jury that these two people were leaving out the door of Mackie's, is that correct?

A. Leaving from Mackie's.

Q. They were leaving the door from Mackie's, right, is that correct?

A. They were leaving from Mackie's, correct.

MR. RAGO: They were leaving from Mackie's. I am done with him, Judge.

THE COURT: Any redirect?

MR. GOLDEN: Yes, Judge.

REDIRECT EXAMINATION

BY MR. GOLDEN:

A. Sir, on October 29th, 1999, you went to the Grand Jury, correct?

A. Correct.

Q. That was before you picked up the arrest in this case, the second arrest for the charges pending, correct?

A. Correct.

Q. And when you testified before the Grand Jury, you were asked certain questions under oath, correct?

[C88]A. Correct.

Q. You were asked this question, and you gave this answer, correct:

1. Q. And did you leave Kermit there at that location?

2. A. He left me at the north corner. He went to talk to some guys in the car.

Is that correct?

A. Correct.

Q. And then you were asked this question and you gave this answer:

3. Q. Did you see him talk to the guys in the car?

4. A. I barely seen him because I was talking to some guy and I was going to get my bucket to go wash a car across the street.

Is that correct?

A. Correct.

Q. And then you told the Grand Jury how you heard the crack of the bat or the sound of cracking wood and turned around, correct?

A. Correct.

Q. You were asked this question: Did you see the [C89]guy that hit him with the bat?

They had run past me leaving the next door running north down Dixie Highway. Correct?

A. Correct.

Q. You also told the Grand Jury that you went to the Markham Police Department and viewed a lineup, correct?

A. Correct.

Q. And on October 29th, you told the Grand Jury that you picked out this defendant in that lineup, correct?

A. Correct.

Q. You told the Grand Jury that is the man you saw hitting Kermit in the head with the baseball bat, correct?

A. Correct.

MR. GOLDEN: Nothing further.

MR. RAGO: I don't have anything.

THE COURT: You may be excused.

15. (Witness excused.)

MR. GOLDEN: Your Honor, at this time I believe we will proceed by way of stipulation.

THE COURT: Do you have that transcript you were going to give me?

[C90]MR. GOLDEN: Yes, Judge.

MR. RAGO: Are you speaking of People's 7, or you can make it a joint exhibit. You can consider it as a joint exhibit, Judge, but for purposes of numbering we will accept it as People's Exhibit Number 7

THE COURT: Okay.

MR. GOLDEN: Judge, the stipulation is if called to testify, Doctor J. Lawrence Cogan, Cook County Medical Examiner's Office, would be qualified as an expert in the field of forensic pathology. He would testify to the following within a reasonable degree of medical certainty.

He would testify that on September 25, 1999, he performed an autopsy on the body of Ramon Nelson under Medical Examiner case number 385 September, 1999. He would identify People's Exhibit 2 as a photo of Ramon Nelson.

During the course of the autopsy, Doctor Cogan noted the following craniocerebral injuries:

A, multiple contusions of the scalp and brain,

B, multiple skull fractures,

C, epidural hemorrhage,

D, subdural hemorrhage,

E, cerebral edema.

[C91]In addition, Doctor Cogan found multiple contusions and abrasions of the face and extremities.

The cause of Ramon Nelson's death was attributed to head injuries due to assault. The manner of death is homicide.

In addition, Doctor Cogan would identify People's Exhibit Number 11 as a certified copy of the autopsy protocol prepared in this case.

So stipulated?

MR. RAGO: Do you want to make it 12, stipulation being number 11.

MR. GOLDEN: That will be fine. We will make it 12 for the protocol.

THE COURT: Okay.

MR. GOLDEN: Your Honor, at this time the People would move People's Exhibits 1 through 12 into evidence.

THE COURT: Any objection?

MR. RAGO: Is there an additional stipulation, counsel?

MR. GOLDEN: In addition, there would be a further stipulation if called to testify, Officer Lee Dean of the Markham Police Department would testify that on September 22nd, 1999, at Ingalls Hospital, he recovered a clear plastic bag from the coat worn by Ramon Nelson. This [C92]bag contained forty smaller plastic bags, each of which contained an off white rocky substance. Officer Dean conducted field tests which revealed a rocky substance, which tested positive for the presence of cocaine.

So stipulated?

MR. RAGO: So stipulated.

THE COURT: That was on what date?

MR. GOLDEN: September 22nd, 1999.

THE COURT: That was from the victim, right?

MR. GOLDEN: Yes, Judge.

THE COURT: Forty?

MR. GOLDEN: Forty smaller plastic bags, and we are moving People's Exhibits 1 through 13 into evidence. People's 11 being the stipulation with respect to Doctor Cogan, People's 12 the certified protocol, and People's 13, the stipulation of Officer Dean.

MR. GOLDEN: May we have a moment, Judge?

THE COURT: Sure, we will take a break.

MR. GOLDEN: That is fine.

THE COURT: We will take about a ten minute break.

(WHEREUPON said matter was recessed, after which the following proceedings were had, to-wit:)

THE CLERK: Larry Owens.

[C93]THE COURT: You have a stipulation?

MR. GOLDEN: Yes, Your Honor. There would be an additional stipulation that on October 18th of the year 2000, William Evans met with Assistant State's Attorney Michael Golden and William Delaney. The purpose of the meeting was to interview regarding testimony that Mr. Evans would be giving in the case of People versus Lawrence Owens.

At this interview William Evans indicated that he wanted his attorney present for the interview, and that he also wished to discuss the deal for his pending cases before being interviewed.

So stipulated?

MR. RAGO: So stipulated and agreed.

MR. GOLDEN: Additionally, just for the record, we did enter into a written agreement with Mr. Evans regarding -- that was provided to counsel. Today during the interview he mentioned he had a pending misdemeanor case. That will be SOL. It is not incorporated in the agreement. I did speak with counsel. I just wanted the record clear on that.

And finally, Judge, there would be a stipulation that People's Number 14 is a true and correct copy of the Grand Jury transcript for the testimony of William Evans [C94]given October 29th, 1999. So stipulated?

MR. RAGO: So stipulated.

MR. GOLDEN: We are moving that transcript into evidence.

Judge, with the admission of People's Exhibits 1 through 14, the People would rest their case in chief.

THE COURT: Any objection to those exhibits?

MR. RAGO: I will have some discussion, Judge, regarding People's Exhibit Number 8 as it relates to one particular witness, but the State appropriately brought in that as to a second witness, so as to admissibility, Judge, we have no objection to all of the respective exhibits, People's Exhibit 1 to and including 14.

THE COURT: Okay, those will be admitted into evidence. State rest. Do you have a motion?

MR. RAGO: Directed finding, Judge. Waive argument at this time.

THE COURT: Denied.

MR. RAGO: Defense rest.

THE COURT: Both sides ready to argue?

MR. DELANEY: Yes, Judge.

THE COURT: Go ahead.

OPENING ARGUMENT

BY MR. DELANEY:

[C95]Judge, there are a couple of things that are very obvious here. First of all, that on September 22nd of 1999, Ramon Nelson was viciously and brutally beaten with a baseball bat. So viciously and so violently it caused multiple skull fractures, epidural hemorrhage, subdural hemorrhage, cerebral edema, all leading to his death.

The other thing that has been proven and not in question at this point, Judge is that this man is the man that did it. He was identified on several occasions by two different witnesses, and as he sits before you Judge, he has been proven guilty at this time. We have proven him guilty.

Judge, it boils down to identification. I think it is very clear that is the issue at this point. You heard the testimony of Maurice Johnnie. Judge, an

individual who did not know the defendant, did not know Ramon Nelson, who happened to be standing or sitting in his car in front of Mackie's Lounge.

He told you, Judge, he saw the victim on his bicycle, he was sitting there waiting for his other friend to come out of the store, he sees Ramon talking to his friend. He sees Ramon ride his bicycle down the sidewalk about eight feet in front of him. About twelve feet down the sidewalk, who does he see; he sees the defendant coming [C96]down the sidewalk. The defendant is coming down the sidewalk at Ramon. Ramon begins to turn his bike around. Before he gets around, he gets clubbed. He gets clubbed in the head with a baseball bat by the defendant. Remember the testimony of Mr. Johnnie, Judge. Again, it goes to how close he was when he first saw the defendant. He was twelve feet, and everything is well lit. The store sits at 159th and Dixie Highway, which you know, you heard the testimony about how well lit that area is. He sat there. He saw the baseball bat. He saw the defendant's face. He saw the defendant clubbing Ramon Nelson with the baseball bat. And he said as Ramon went down in front of that, in that doorway, the defendant was not done, because he took a couple more shots at him, Judge, all in the head or upper body, all causing multiple skull fractures, all causing the injuries that caused his death.

He is the individual who did it, and he was identified again by Mr. Johnnie. What did Mr. Johnnie and his friend do. They take off, no. They get up and the defendant run away. They throw

Ramon into his car, and take him to the hospital, talk to some police. Where do they go. They go back to Mackie's, talk so some more police.

[C97]Six days later, what do Mr. Johnnie do, he comes in and talks to Detective Sergeant White, gives them a description, tell them what happened, and says yes, from the photo array, says yes, that is him. Who does he pick out, the defendant. Who does Sergeant White tell you he picked out, the defendant.

Some weeks go by, almost a month, who gets arrested. The defendant. And remember, Judge, and it has been stipulated through the testimony of Officer Alexander about how the defendant was arrested. He saw him speeding in a residential area right over here in Markham. He was going about fifty mile an hour in I believe it was a twenty-five a mile an hour zone. Does the defendant stop. No, he takes off in his car.

Is he worried about getting a speeding ticket, no. He remembers --

MR. RAGO: Objection, Judge, first off this might be other crimes evidence, which is not appropriate, and second it is also --

THE COURT: Well, the fleeing is appropriate.

MR. RAGO: It is not even close in proximity or location.

THE COURT: I am talking about the original arrest, this arrest where he was taken into custody. Go ahead.

[C98]MR. RAGO: Judge, it was not on the 22nd.

THE COURT: The date he is talking about.

MR. DELANEY: I am talking about October 26th.

THE COURT: Right.

MR. DELANEY: When the defendant was arrested.

MR. RAGO: More than a month later.

THE COURT: Okay, I know.

MR. RAGO: All right, Judge.

MR. DELANEY: Judge, does the defendant stop, no. The defendant continues on. When the defendant finally stops his car, does he get out and talk to Officer Alexander. No, he takes off again on foot. Officer Alexander has to chase him down. He knows it is still fresh in their minds what happened at Mackie's Lounge about a month earlier.

MR. RAGO: Objection, Judge, move to strike.

THE COURT: Overruled.

MR. DELANEY: He is arrested. Maurice Johnnie is called back to the station. We want you to

look at a lineup. Who does he pick out of the line up, the defendant. The defendant who he picked out of the lineup -- picked out of the photo array on September 28th, the defendant he saw for several seconds in a well lit area on September 22nd, 1999, the same defendant he saw [C99]clubbing Ramon Nelson in the head with a baseball bat, Judge. It is something an individual cannot forget. It is not watching somebody slap somebody on the back of the head with their open hand. It is somebody clubbing somebody in the head with a baseball bat. That would stick out in your mind, and it did. It did so that he identified him from the photo array and he identified him in the lineup, and he identified him here in court today this morning.

Again, he has no ax to grind, Mr. Johnnie. He told you what he did for a living. He told you he didn't know any of the parties. He is here because he is telling the truth. That is all, Judge.

Then we have the testimony of William Evans. Now, first of all, Judge, William Evans is who he is. He was at Mackie's Lounge. He told you about what his background is, and what he has done since, and he is no angel, but you know what, this is not central casting where we can put whatever witness we want on there, some little old lady who goes to church every day, and you know she is telling the truth. He, the defendant chose to do this at Mackie's Lounge on September 22nd, 1999. He chose to do it in front of William Evans. We didn't pick him. The defendant picked him, but it is clear [C100]again, of his testimony, Judge, which corroborates Mr. Johnnie's

testimony, who has nothing to gain or lose here. He is just here to tell the truth.

What does William Evans tell you. He says the defendant is the one with the bat. The defendant is the one that is hitting Ramon Nelson. The defendant is the one that flees. The defendant is the one he picks out of the photo array himself. Then, later in the lineup. He told you that he testified at the Grand Jury before he got arrested again.

He told you about the lighting conditions. He told you about how close he was to the defendant, and you can see the pictures, Judge. We are not talking blocks. We are not talking about several hundreds of feet. We are talking eight to twelve feet in a well lit area. Lights on, in front of the store, lights on in the store. He is standing right outside watching the whole thing, and he is standing there when he runs by him, the defendant runs by him with the baseball bat.

That is all there is to this, Judge, other than the fact though, I forgot, that some seventeen year old young man loses his life out in the street with a baseball bat.

Judge, if you look at all of the evidence and you concentrate on the testimony, and again, I can't [C101]reiterate enough about the identification, how they identified him and where, and what they did. Counsel would have you believe he didn't talk to the police right away. He was talking about Maurice Johnnie. Well, shame on him. What does he do. He

takes the kid to the hospital and then he comes back. Did they have to drag him back to the police station twice. No, he came back to view the photo array. He came back to view the lineup. Again, who did they pick out. The one guy that is sitting before you, Judge, the man that is on trial, the man who viciously and brutally killed Ramon Nelson, and we have proven that today, Judge, and we are asking for a finding of guilty. Thank you.

THE COURT: Okay, Frank.

CLOSING ARGUMENT

BY MR. RAGO:

I hope counsel will accept this as a compliment, but there are two points that he made that I need to agree with. Whatever he was engaged in, the seventeen year old should not have died out there, whatever. The pain of the family, nothing that we say here will help to take back the hurt. I hope the family will accept our prayers and thoughts as we all here wish to extend to the family, and this case comes down to is there an identification [C102]here. Is there proof beyond a reasonable doubt.

When I come to these type of cases in front of the Courts or jurors, I am fearful of one thing. It is too easy to say all right, credible witness, if available, one or two, if credible, therefore identification is okay. It is too easy to do that.

We came before you because we want you to test that to see if it is really proof beyond a reasonable

doubt under these facts, these circumstances, these events and the conduct and action of the people. Because to test, to truly test identification, which is now in the court systems becoming more and more under scrutiny because it may not be so inherently credible as we always believed. Other countries have taken different views. We have not yet, but looking at this very very carefully, leave us see what really is here.

Now, we don't fault the State for who they have to pick out there, but please, don't blame us saying somehow, we, the defendant, or the defense picked people to be witnesses. Good God, I don't think anybody is going to pick anybody to come in and accuse them. It is an ingenious argument. It is creative. It is inappropriate to the real issues before you.

So what is really here before you. How do you go [C103]about saying somebody says, somebody denies. My client came in before you having denied his guilt. He entered his pleas of not guilty and he is before you on trial. Somebody accuses and says he is the one, or let's say even two say that. Are they telling you the truth. Are they telling you a quantum of facts and circumstances that lets you believe beyond a reasonable doubt, which is that standard that I know you hold that very dearly to you, that proof beyond a reasonable doubt exist.

Promise you won't get angry with me, Judge, but the reason I suggest to you when we had this discussion regarding People's Exhibit 8 that was in

inappropriate for the State to deal with, they deal with the police officers, the following reasons. I am only doing this for physical demonstrative purposes. Let's imagine that this is a book in the police station with all the photographs. You are well aware of them. I don't know how many thousands you probably have seen in your career, but hers the volume, go see if you find somebody. Here is People's Number 8 for identification, now in evidence as People's Number 8, 6 photographs.

Mr. Johnnie wants us to believe he has identified somebody from a book. The officer says no. From six. We have a tangible physical item that is contradictory [C104]here and it goes straight to identification. Why is this important. Mr. Evans. Mr. Evans points Number 4, my client, oh no, no, no no, no. Mr. Evans says oh, no, I pointed to number two, number two on People's Exhibit 8. That is not my client. You see the problem in letting the police officer say who picked out what when it came to Mr. Johnnie. Thank God at least we are still left with the record here that clearly shows Mr. Johnnie talks about a book. Police officer says no, it not a book. It is six. We can't give much more disparity than that as a physical manifestation that Mr. Johnnie is to be held in question.

I am not going to presume anything here, but Mr. Evans is an outright, self-serving manipulator. He didn't quite get it right at the time that he was suppose to go in there and do some sort of ID. How dare I say that. I said that because the inference from all of this evidence and facts is that we have

some actors here that have not come here before you. A driver of the vehicle with the owner in there while the owner is passively doing whatever this person tells him to do. Yes, I finally agreed to take this guy to the hospital, he insisted. We get to the hospital, the driver talks, not me. The driver goes back, talks, not me. And we go back [C105]to Mackie's, why. I am sorry, you know, a guy does you a favor washes your car, how far do you go to having him determine where the heck you are going in your own vehicle. Common sense tells you that is something else at play here. Why did they go back Mackie's. To have a drink. Why go back to Mackie's. Why spend three or four minutes with a seventeen year old talking to somebody who is a peer of Mr. Johnnie, but no basis or knowledge of why he looks up to him.

What was found in this child's pocket. I speak of a child as a seventeen year old as compared to adult males. Forty bags. You know darn well what was going on out there in the street in front of Mackie's. You know darn well. Johnnie seems to be a player here. He seems to have certain control over what people will do and say.

So let's get to what supposedly happened out here and see if any story finally, finally has some credible consistency. I am going to suggest to you I am going to look at Mr. Evans and Mr. Johnnie, and I am going to look at just Mr. Johnnie, because again, I fear again, our law is frightening on this aspect. Well, okay, we will discard that witness, but guess what we have one clear present witness that comes across and tells us something that we can

hang our hat on. Well, Mr. Johnnie can't [C106]hang his hat, because he doesn't know the difference between a book or six, or is he fibbing to us.

A man who won't go to the police, won't volunteer anything at Mackie's, won't volunteer anything at the hospital. First he says oh, no, there was no police there. Then he says oh, yes, I guess the police were there. Oh, yes, I guess Johnnie talked to them. In fact, he even yelled from the car, hi, by the way, we are the ones that brought him here, and away they go. I am sorry, you know all of those inconsistencies in the story of Mr. Johnnie. Simple things, simple things that people normally would not do suddenly are glaring contradictions in Mr. Johnnie. Either the police are at the hospital or they are not. You either talk to the police at the hospital or not. You either have an opportunity to talk to the police at the hospital or not.

Which part of the testimony -- excuse me, I have to denigrate that, I won't tell it as being testimony. Mr. Johnnie's story contradicts even on these small parts; from books to six, from police being there to not being there, availability or not availability, and oh, okay back to Mackie's. The police came and got him. They called him by phone call and said come in here. You can imagine that phone call. We know you got something [C107]to tell us, come in here and talk to us. The 22nd, the 28th, that is six days.

Oh, so what does Mr. Johnnie give. Mr. Johnnie gives a height and approximate weight, and again let's be fair to civilians. We are not going to nail

them down precisely, but we are going to say height and weight, big, and approximate height. What lineup does he see, seated people, so he picks big.

Not only that, he also picks -- take a pick, book or six, which add to the problem here. It adds to it. It doesn't affirm. You can't say well, now they have consistent identification, because on one day he does it here, and another day he does it the other way. Why, because Mr. Johnnie didn't stand in front of you and point to one of these six, Judge, and say I picked out this person. He never told you that in this courtroom. He tells you he picked something out of some book that is not here in evidence before you. Some book.

Oh, yes, we are suppose to somehow take it that is my client in some book that we don't know about. Okay, Mr. Johnnie. Mr. Johnnie says oh, gosh, well, I am within eight feet, twelve feet, within certain feet. People's 5, People's 4, People's 9, if you will take a moment just to look at those.

[C108]THE COURT: Okay.

MR. RAGO: What are you told by these. These photographs are physical. We went out to the scene. We agree with the State that they truly and accurately represent Mackie's, including the locations of the lights, and I submit to the Court that because that was a commercial area there are tons and tons of street lights out there.

So, if somebody wants to say they could see, yes, unless all the lights were out, and they were not.

The lights were working. Look at all those lights across Mackie's front. They were circled for you. Add to those Harvey street lights, those big, huge vapor, or sodium vapor lights, whatever the heck it is. This is lit, so what would you expect somebody to be able to tell you, that they watched somebody walking this way, meaning north, and somebody, one person according to Mr. Johnnie, one person walking from the northeasterly to the southwesterly, and then eight feet away or so, this supposedly confrontation. Persons walking in this direction. Okay, you and I are approximately eight feet away. What do you see about my face, Judge. We are talking well lit. We are talking about a whole array of lights across Mackie's. We are talking about all the [C109]streets lights surrounding us. What can you see about my face. Take a look at my client, what do you see on his chin. No, you get about 6'2, you get about two forty, you don't see the most prominent thing that would make you look at my client and say he is the guy, his mole, right in the middle of his chin.

Oh, yes, after he beats on somebody and supposedly they fall into a doorway, does he turn this way keeping himself facing toward the wall, and going oh, no no, no. He will conveniently turn around so Mr. Johnnie gets another full look and then head north. After all, we have to have a real good identification here, so Mr. Johnnie gives us wonderful opportunities for his observation and capabilities of seeing it. Bunk, because right there is another physical thing is Mr. Johnnie telling the truth, and the answer is no, no. Books versus six,

mole versus nothing, 6'2, two hundred forty. Of course, I am not going to tell the police that I saw a guy two forty, with a pimple, or mole, or something big right in the middle of his client, right there. Right there.

You don't even have directional lighting coming from Mackie's. Which is only about maybe ten feet high, going down right towards him, and you could see from the [C110]physical layout that is exactly what has to happen with those lights right there. It is like a shining broad light coming right into the face, if you are going to believe Mr. Johnnie, he sees my client. Bunk, pure bunk.

Oh, Mr. Evans, now, not one, two. Let's get to Mr. Evans. Mr. Evans is at this north end. Mr. Evans is supposedly talking to the young lad. It would be to the right of Mr. Johnnie. If Mr. Johnnie's car is facing Mackie's, and we are going to make you now the Mackie store front, and here is the two doors, and here is the car parked here about, three, four, five feet away from the front area. As you can see, there is the sidewalk area, the same plane as the parking lot, so there is no obstructions there. Don't think we have blocks of vision here. There is the car parked here, there is the two doors.

According to Mr. Evans, he is standing over there talking to somebody. What does Mr. Johnnie tell you, oh no, no, no, from some group over here, guy comes over to the left side have the car, which is the driver's side and talks three to five minutes. Consistent, no.

Does Mr. Johnnie tell you that he sees anybody on that side, ever. No. Certainly, Mr. Johnnie is one person, and the young lad. Where the hell is Mr. Evans. [C111]Mr. Evans comes before you with his story, or he doesn't know about the car. Oh, yes, he was talking to two people in the car. Bunk. Again, you want to test credibility here and see if there is any identification that could be based upon this garbage of statements coming from people. You want to look at the demeanor of Mr. Johnnie. Look at how hesitant he was as to why they went back to Mackie's. Wait a minute, uh, uh. That is my car. I don't want to take this kid anywhere. No, this is not Good Samaritans out here. That driver, again I suggest to you, is taking a whole lot more control here than just being a nice person.

So, where is Johnnie. Where are these other people. No, you have Mr. Evans and you have Mr. Johnnie. The first time I said that in this last paragraph that Johnnie is the driver, I will call him the driver, where the heck is he, the one who always talks to the police, who directs what is going to happen, where people are going. And Mr. Evans, Mr. Evans can be some place, have a conversation with the soon to be attacked person, right where one of the circles for Mr. Johnnie, but be un -- hold on one second. Unavailable to Mr. Johnnie's sight, somehow hidden, somehow invisible. Oh, please. In an area lit as it is, with no obstructions. You can see [C112]there are no obstructions.

Well, according to Mr. Johnnie he gave two factors to the police to find some suspects, height,

weight. And here is the lineup that took out one of those two criteria. Everybody is seated. Go for bulk. What a wonderful basis for an identification, who is the bulkier.

In case there is something magical about the car, Judge, People's Exhibit Number 3 in evidence, Mr. Johnnie's car, there is nothing magical. There is no frosted windows. There is no obstructions. There is nothing hanging that would obscure the view, other than a small little thing from the rearview mirror, so you can see out the side mirror, the side windows. You can see out the front windshield. There is a standard little post there supporting the car roof. That certainly doesn't explain away Mr. Johnnie's inability to see Mr. Evans.

The Grand Jury transcript of Mr. Evans. Truthful testimony. As long as it seems to hold then I guess the State has to buy it, so they are certainly not going to buy that gee, all I see is this guy as I am leaving to go get my bucket. And we will deal with the bucket here a second. Gosh, I turned around and the guy is already [C113]laying on the ground. That doesn't make him worth spit.

Does he say in the meantime from having left this guy somebody walks past him with a bat in his hand, a large adult. No that is not what he told the Grand Jury, not until he was prompted and he realized he had to give up some more.

Oh, and this bucket, how convenient. It was around the corner, supposedly, and I don't know

which version you want to take, is it or is it not obstructed as far as being grabbed by some garbage can, but what a nice convenient way to play it either way as Mr. Evans would play it. Oh, no, I can reach around somehow, and oh, yes, I can still see what is happening back over there, even though I didn't first mention that somebody walked past me until further prompting. I mean, after all he has got to give something. Otherwise his testimony is not worth spit. His primary purpose was to find something in order to get himself out of the trouble, because he knows otherwise he is going to the penitentiary, and who can really test him, Mr. Johnnie. Mr. Johnnie can test Mr. Evans. Mr. Johnnie, one person. Mr. Evans, two people. Mr. Johnnie, where is Mr. Evans. Mr. Evans, oh, I am right there where Mr. Johnnie would be looking at me, if you want to take these two things [C114]and kind of see if they fit. Here I am right there. No, the young lad is not over on the other side, on the left side of the car coming to left side of the car to talk to the driver, then starting to head north where he is then accosted by the person who hits him. No, no, no. Mr. Evans says no, no, no. I am talking to him on the right side of what would be the car, which I don't know if it is there or isn't there, but okay, yes, it might be there, it is not there.

Remember again, his story on direct examination, cross, as compared to the Grand Jury. It is or isn't. Again, so, and then as I am turning and the kid is going one way, then somebody comes by me with a bat. Oh, sure. Does Mr. Evans ever tell the police, by the way the guy that was -- how close would they have to pass right there. Okay, over

there is the door, here is the northeasterly part of Mackie's about twelve feet away from the doors if you look at those photographs.

Here is Mr. Evans talking with the seventeen year old. Mr. Evans starts turning around to go over here to the corner, ten, fifteen, twelve feet. You can guess if you use those estimates. You can use the door as a standard doors for a commercial establishment and here is this guy walking right past them. He notices the bat. [C115]Does he keep his eyes down and not see a face. Does he ever tell the police, by the way, take a look at the face. There is a mole. Here is the clothing description.

What does he tell the cups, and supposedly the cops are running around trying to find somebody. It is so natural to pick out. Remember how the police want that, that one distinguishing characteristic, that one thing that stands out so even if the get the height wrong, or if the get the weight wrong, their it is, and a good police officer looks for that one solid striking characteristic, which Mr. Johnnie doesn't tell you about ever and doesn't tell the police ever, and doesn't tell the Grand Jury ever. Mr. Evans doesn't tell anybody ever about this at any one of these way, shape, or form times. His wonderful opportunities of identification.

By the way, Mr. Evans is not involved in any gang activity. He is talking to a seventeen year old kid on a bike. This would be his per group, sure. Add that to the credibility issues regarding Mr. Evans. Mr. Johnnie was led around by the driver.

That lends itself to wonderful credibility issues as well.

What others issues do we have here, Judge. Mr. Johnnie might have said something here very validly [C116]and it sounds innocent enough, but at least Mr. Johnnie admitted that he never ever saw my client before. If he watched a beating and saw this guy approach and sees this guy turning around, and of course, giving him a wonderful opportunity to see this assailant full face, and never mentions one striking characteristic, striking characteristic.

Mr. Johnnie has never seen my client before. Of course, now Mr. Evans says he has seen my client around. So of course, he would be more aware of facial distinctive characteristics. Of course, never mentions them, but let's get to the final point here.

Let's throw away Mr. Evans. Do we have enough with Mr. Johnnie, who seemingly is a little bit cleaner, and I won't be facetious and say the State would be more happy that he is a little bit closer to the casting group, or the kind of witness they would like.

So, is Mr. Johnnie sufficient. Is he sufficiently believable and his identification credible enough to sustain a conviction beyond a reasonable doubt. Let's reiterate; book versus six pictures. Wonderful description. Two aspects; supposedly bulk, and height. Again, you know what is missing. When it comes to the lineup ID, half of those criteria is taken away, but one [C117]is added here. See if Mr.

Johnnie is stuck with the book, the only one he saw in the book and he saw at the sit down lineup was one person. Well, that kind of gives you a real good hint here. If you want to say that of the six -- well, we will even be nicer to the State here, and again these are arguments I have to make, Judge, because the law of the case here, I still suggest to you that Mr. Johnnie should not be -- I am sorry, the officer should not have been allowed to testify whatsoever regarding the six, People's Exhibit 8. One of six, doesn't see any of the other five from People's 8 in the sit down lineup.

Mr. Johnnie doesn't see Mr. Evans. Mr. Johnnie has somebody coming from the lefthand, somebody else from the right. Mr. Johnnie has a three to five minute conversation. Mr. Johnnie is getting led around by his driver. The first named Johnnie. Mr. Johnnie doesn't want to get involved on the scene, at the hospital, back at Mackie's, and only when the police then say come does he try to come up with something.

Yes, Judge, you can blow off all my arguments. You can blow off each and every one of these points; inconsistencies between the respective witnesses. You can try to flip flop them around, balancing them and try [C118]to perhaps even accept parts of testimony and not other parts of testimony, and say okay, we are left with at least one witness who is credible and that identification is sufficient.

Judge, we suggest to you when you look at everything here in the way that people normally act,

and what people would normally say when given those opportunities, what happened out there was far different, far different. And somebody has to take the fall and it got oops as to who was suppose to take the fall, because again, People's Exhibit Number 8, number two is picked.

When you had a real witness standing in front of you, Mr. Evans, and I am not vouching for his credibility. He says I picked number two. Judge, acquittal is appropriate here. Thank you.

THE COURT: Okay. State, do you need any time?

MR. GOLDEN: I am ready, Judge.

REBUTTAL ARGUMENT

BY MR. GOLDEN:

Judge, this is a case about identification, and in this case identification equals recognition. The question is when they looked at the lineup did they recognize Lawrence Owens as the man who killed Kermit; Ramon Nelson, and the answer is an emphatic yes, Judge.

[C119]Maurice Johnnie does not know William Evans. William Evans does not know Maurice Johnnie. Yet, independently each of these men looked at a lineup and picked this guy out as the killer, and they did that because he is the killer. And that is the important thing, Judge.

Now, counsel wants to talk about all of the alleged inconsistencies about what happened. When Maurice Johnnie went there that night to Mackie's Lounge, he thought he was going there just to stop and have his friend walk into the store, his friend's friend. He doesn't even know who is in the back seat. Nothing special there.

He sees young Ramon come up to the car. That draws his attention as Ramon is talking with Johnnie Morgan. That is something that might be out of the ordinary that would draw his attention. He is not paying attention to everybody else in the parking lot, and if he came in here and told you he was, Judge, you would not believe him, and the reason is that is not what normal people do when we just go out on routine errands, and that is what Maurice Johnnie thought he was doing that night until Lawrence Owens turned that errand into his own mission of death.

Williams Evans told you that he was talking with [C120]Ramon. He left. From the Grand Jury transcript, which is substantive evidence, he went and talked with somebody at the car, just like Maurice Johnnie said. William Evans sees Lawrence Owens come by. He recognizes him from being in the neighborhood, doesn't know his name, has no ax to grind against him, sees him walking with a bat, and another man,

He recognizes the other man, because he sees the guy with the bat. Maurice Johnnie is watching this young had ride his bike, attempt to turn around and

his attention is drawn to Lawrence Owens standing there with the bat beating a child in the head at least three times, so severely that he crushed his skull and fractured and kills him.

How do we know this is consistent, Judge, William Evans runs over to help his friend Ramon. Maurice Johnnie says some guy that I don't know helped put him in the car and they then drive to the hospital. Maurice Johnnie and Johnnie Morgan they drop him off. They go back to the Mackie's Lounge, and counsel says why do they go back. They were missing the person from the back seat, Judge.

And when they got there, Johnnie Morgan talked to the police and gave some information. Maurice Johnnie is not [C121]a person who that night took the initiative to get involved. He is not somebody that was so hell bent on coming against Lawrence Owens, who he has never seen before. He came later, Judge, when the police asked him and did what a citizen is suppose to do. He told them what he saw, and looked at a photo array, and he picked out the defendant. A month later he looked at a lineup. He picked out the defendant. The same defendant that William Evans, who doesn't know Maurice Johnnie picked out. That is an amazing amount of coincidence, Judge.

Regardless of the mole on his chin, he is guilty based on those two independent identifications, each of which corroborates the other. And keep in mind, Judge, when you are judging the credibility of William Evans, he is no saint, he testified before that

Grand Jury and he made that identification in the police department before he picked up his new case. That is not a motive for him to lie, Judge. His testimony at the Grand Jury is consistent and that is further corroboration. You have enough evidence to find this defendant guilty, Judge, and we would ask that you do so.

THE COURT: After hearing this case, I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is [C122]a drug dealer, who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder. A month date for motions and --

MR. GOLDEN: Yes, Judge. I believe I am on trial the week of the 4th, so if we could continue it some time the next week.

MR. RAGO: To avoid any possibility of my waiving any errors that I should raise on post trial motion before you, depending on the availability of the transcript of the testimony had at this trial, on good cause the Court can extend the thirty days beyond that month.

THE COURT: How about December 7th?

MR. GOLDEN: I think I will be on trial in Bridgeview, Judge.

THE COURT: We will get a date that date.

MR. GOLDEN: Okay.

THE COURT: Just to protect the record.

MR. RAGO: That is fine.

MR. GOLDEN: Judge, I would agree to a later date.

THE COURT: What date?

MR. RAGO: The next week.

MR. GOLDEN: If the transcript is not available we can deal with it that day, but I will waive the thirty [C123]days up until the next date.

THE COURT: The 8th is the thirtieth day.

MR. RAGO: Judge, it looks like December 4th would be a better status date, because you have all those other dates probably marked as being busy in this courtroom. It will only be for status.

MR. GOLDEN: If it is just for status, that is fine.

THE COURT: 12/4.

MR. GOLDEN: Your Honor, at this time we ask to revoke bond.

THE COURT: What is the bond set at now?

MR. GOLDEN: It is no bail, Judge. I apologize.

THE COURT: PSI ordered. By agreement, 12/4.

MR. GOLDEN: We just ask leave to withdraw our exhibits at this point.

THE COURT: Okay, go ahead.

16. (WHICH matter was continued until the 4th day of December, 2000.)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA *ex rel.* LAWRENCE OWENS,	)	Docket No. 08 C 7159
	)	Chicago, Illinois
	)	July 28, 2015
Petitioner,	)	9:45 a.m.
	)	
v.	)	
	)	
STEPHEN DUNCAN, Warden, Lawrence Correctional Center,	)	
	)	
Respondent.	)	

TRANSCRIPT OF PROCEEDINGS - Motion Hearing BEFORE THE HONORABLE THOMAS M. DURKIN

APPEARANCES:

For the Petitioner: JENNER & BLOCK LLP by
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[2]APPEARANCES (Cont'd.):

HONORABLE ANITA M. ALVAREZ
COOK COUNTY STATE'S ATTORNEY by
MR. ALAN J. SPELLBERG
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Supervisor Criminal Appeals
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Chicago, IL 60602

Also Present: MR. ROBERT S. NATHAN
(as noted)

Court Reporter: LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

[3](In open court.)

THE COURT: Okay.

THE CLERK: 08 C 7159, Owens v. Acevedo.

THE COURT: Good morning.

MR. FISCHER: Good morning, your Honor. Assistant Attorney General Garson Fischer for the respondent.

I've also got two representatives of the Cook County State's Attorney's office here with us.

THE COURT: Oh.

MR. GOLDEN: Michael Golden from the Cook County State's Attorney's office.

MR. SPELLBERG: And Alan Spellberg, also from the Cook County State's Attorney office.

THE COURT: All right. Thanks for coming in. You could have come in by phone if you want, but I appreciate your coming down to the courthouse.

MR. NATHAN: Good morning, your Honor. Robert Nathan on behalf of Mr. Owens.

THE COURT: All right.

MR. VAIL: Good morning, your Honor. Andrew Vail, with my colleague Skyler Silvertrust, from Jenner & Block.

THE COURT: All right. First up is a motion by Mr. Nathan to withdraw. Any objection?

MR. FISCHER: No, your Honor.

THE COURT: Mr. Nathan, I'll grant your motion to [4]withdraw. Sorry you had to wait, but –

MR. NATHAN: No problem, Judge. Thank you.

THE COURT: -- it's been a long morning.

And has Jenner put an appearance on file?

MR. VAIL: We submitted it as part of an exhibit, but we'll now file the appearance with the Court, yes.

THE COURT: All right. Very good.

All right. Thanks, Mr. Nathan.

MR. NATHAN: Thank you, Judge.

(Mr. Nathan exits the courtroom.)

THE COURT: Okay. We have the issue now of apparently the state literally following the -- or the Attorney General literally following the order of the 7th Circuit, which is to say you intend to retry -- or the state intends to retry Mr. Owens. Correct?

MR. FISCHER: Yes, your Honor. The state -- or respondent's concern is that we do have a cert petition on file. And since the habeas grant would simply order petitioner's release, as opposed to in a -- you know, say in the State Supreme Court actually directly vacating the conviction, if proceedings begin in the Cook County Circuit Court, it will be the state court then subsequently vacating his conviction to begin new proceedings.

And we don't know. It's unclear from the case law what effect that might have on the pending cert petition. So [5]we're trying to defend the current conviction, but at the same time, the 120 days to decide to retry him from the conditional writ expired on July 21st. And these two parallel tracks may conflict with each other in some way.

So we're trying to move forward with our cert petition, defending the current conviction. But we do want to inform the Court that the Cook County State's Attorney's office has decided they're going to retry should the writ be passed to the state court from this Court.

THE COURT: All right. Well, I'm unfamiliar with the process. I -- there aren't many of these cases that come through here, and those that do, I certainly haven't dealt with them before. I'm relatively new.

So you have an order from the appellate court, from the 7th Circuit, which reads -- to get the language precisely -- "So we reverse the judgment

denying Owens relief and give the state 120 days in which to decide whether to retry him. If it does not decide within that period to retry him, he must be released from prison."

I have an affidavit from Mr. Golden saying the state intends to retry him.

MR. GOLDEN: Yes, Judge, we do.

THE COURT: Does that -- and I want to hear from Mr. Owens' counsel. But does that fulfill the requirements of the 7th Circuit's order, understanding you can't just say, "We [6]intend to retry him," and then not do it within a reasonable period of time?

MR. VAIL: Right, your Honor. And I'm going to allow my associate the opportunity to respond to this Court. But I do want to say that we did have the opportunity to spend some time talking through some of the practical concerns and issues surrounding these questions with counsel outside.

And one issue, as the Court's now touching on, is my client's sitting incarcerated -- right? -- and he has a right under the Illinois law to a trial within 120 days. Now --

THE COURT: Well, the -- under Illinois law -- the 120 days, is that referencing a state Speedy Trial

MR. FISCHER: We have --

THE COURT: -- statute or the 120 days in the 7th Circuit order?

MR. FISCHER: -- effectively two 120-day periods here. We have the 120 days from the conditional writ, and then also the statutory -- the Speedy Trial statute in Illinois for a defendant who is in custody is 120-day --

THE COURT: I see.

MR. FISCHER: -- period.

THE COURT: Okay. All right.

MR. VAIL: So given that, your Honor, and given concern surrounding that, it's our view that this needs to be moved over to the Circuit Court of Cook County, to the criminal [7]court, whether it's Judge Biebel who gets this case and then determines how --

THE COURT: Well, he's retired, so whoever takes his place.

MR. VAIL: Well, yeah, exactly, but how this needs to proceed. We need to get to go there.

But I do want to give my colleague the opportunity to --

THE COURT: All right.

MR. VAIL: -- respond to the bigger question before this Court.

THE COURT: Go ahead.

MR. SILVERTRUST: Your Honor, Skyler Silvertrust on behalf of Mr. Owens.

Yeah, I think we appreciate that the state is willing to announce its intent to retry him, but the problem is that really doesn't get Mr. Owens anywhere. He has a conviction that's essentially been invalidated by the 7th Circuit. 7th Circuit gave 120 days within which to decide whether or not to retry him. That 120 days has expired, and now we're in a position where Mr. Owens is basically being held without a valid conviction and without any charges that have actually been filed against him in a state court.

So we don't have the opportunity to seek bail on Mr. Owens' behalf, and we don't even have the opportunity to [8]obtain discovery that we would need to defend a case that may be brought against him.

THE COURT: Well, how would the state proceed? What's the next step within the State's Attorney's office on this case?

MR. GOLDEN: Typically, Judge, if this was an appellate -- state appellate court, the mandate would issue to the trial court. Once it was spread of record at the trial court, the Speedy Trial statute term would begin at that time. That would be the typical course on a state appeal.

Quite honestly, I'm not sure on the habeas under this circumstance --

MR. SPELLBERG: Right.

MR. GOLDEN: -- where the -- there's a pending petition for writ of cert, and we would -- it would be our belief that that should stay the proceedings until the Supreme Court has a chance to either deny or grant the writ.

THE COURT: Well, there was a request to stay filed with the 7th Circuit, correct?

MR. FISCHER: There was a request to stay filed with the 7th Circuit and also with Justice Kagan, who is the circuit justice, and they both -- they both denied those requests to stay.

As we mentioned in our status report, a couple of facts have changed since then. The cert petition is now [9]actually on file. And just, you know, acknowledging the practicalities of the way the Supreme Court does their business, we won't have a decision on the cert petition until October, in all likelihood.

THE COURT: Well --

MR. SPELLBERG: Your Honor --

THE COURT: Go ahead.

MR. SPELLBERG: -- can I say one thing?

Just in terms of the sort of jurisdictional problem that we have in the state courts, under Illinois law, the Circuit Court of Cook County cannot take

jurisdiction back over this case unless it were to vacate the judgment and vacate the conviction. That's the only way that we can start our process on behalf of the People of the State of Illinois.

THE COURT: Who would vacate it?

MR. SPELLBERG: The Circuit Court of Cook County. It would be the chief judge. Judge Kazimirski is currently acting chief judge of the Criminal Division.

THE COURT: All right. Well, if I remanded this case to the state court as of this moment -- I don't know if I have the power to do so, but if I entered an order to say the case is remanded to the circuit court, Judge Kazimirski then would pursuant -- I assume pursuant to the 7th Circuit opinion vacate the conviction, or would he stay the case while he's waiting for the cert petition to be decided?

[10]MR. SPELLBERG: I think he would be obligated pursuant to your order to actually vacate the conviction. We would have to begin our process at that point.

THE COURT: All right. And what is wrong with doing that, if anything? Is there an objection to that?

MR. FISCHER: Well, your Honor, the concern from the respondent's perspective is, obviously, if, you know, the State Supreme Court had vacated conviction and it had gone up and a cert petition was successful, overturning this or reversing the state

court's judgment vacating the conviction would revive the conviction.

Here the grant of the habeas writ doesn't in and of itself vacate the conviction. It orders the petitioner's release unless the constitutional violation is corrected, in this case, by granting him a retrial.

It is unclear -- not conceding that -- that it would be a problem, but it's unclear whether if we were successful on our cert petition reversing the 7th Circuit's conditional habeas grant would have any effect on the subsequent action of the state court to vacate the conviction.

In other words, it's possible that the state court vacating the conviction we're trying to defend right now would moot or end our current appeal in from the habeas petition.

MR. SPELLBERG: And, your Honor, if I could add one more thing.

[11]THE COURT: Sure.

MR. SPELLBERG: It's our belief that under Illinois law, once the conviction is vacated, we can't go back and reinstate it at that point.

THE COURT: Yeah, that was my next question, if there would be a double jeopardy issue --

MR. SPELLBERG: Right.

THE COURT: -- on that. You would have to retry him even if the 7th Circuit --

MR. SPELLBERG: Yes.

THE COURT: -- 7th Circuit's decision were reversed by the Supreme Court.

MR. SPELLBERG: Yes.

THE COURT: And we won't -- we're just talking about a cert grant, not even a reversal. It could take another year before it got briefed, argued, and decided by the Supreme Court if they granted cert.

MR. FISCHER: Yes, your Honor. We did ask for summary reversal, which is historically in these types of cases -- *Musladin, Wright v. Van Patten* -- the way that the U.S. Supreme Court has dealt with arguments such as the ones we raise in our cert petition.

THE COURT: Okay. So it may be more expedited.

MR. FISCHER: And just a couple of quick observations. One is because habeas is an equitable remedy, as we cited in [12]our status motion, the Court does have the authority to extend the period of time in which the state has to correct the constitutional violation before issuing the writ.

And, two, one option in terms of discovery and issues like that is we could try to proceed either, you know, just between counsel in terms of whatever

materials need to be presented back and forth or through this Court while the cert petition is pending rather than remanding it to the state court where it might have these, you know, considerations with mootness and double jeopardy that would prove problematic.

THE COURT: Well, could a trial date be set in state court? Could it be assigned to a trial judge and a trial date set with a conviction on the books that hasn't been vacated?

MR. SPELLBERG: I don't believe so, your Honor.

THE COURT: Okay. With the full understanding of all parties that it might get reversed, so a speedy trial may have to occur upon the -- well, it might get -- if it's reversed, you wouldn't have a trial; if it got affirmed, you would have to proceed quickly with a trial.

MR. SPELLBERG: The problem, your Honor, is that from the state court judge's perspective, there is a binding final conviction, which they can't act contrary to without sort of a revestment of jurisdiction and our -- and taking a position contrary to that. And then once they do that, our understanding of Illinois law is they can't go back.

[13]THE COURT: Okay.

Well, what's the view of the plaintiff? I mainly -- it may very well be you want to file a written response to the status report of the Attorney General

or suggest how you want to proceed. I have to follow the 7th Circuit's -- of course, I have to follow their judgment. But what they said was the state has 120 days in which to decide whether to retry him.

Now, taken literally, they have given that notice to you. I think the clear intent is to get him retried one way or the other under this order absent some reversal by the Supreme Court. And mere notice is not enough. It's going to have to be some action beyond just, you know, "We intend to retry him, but we aren't going to say when."

So what do you want to do? Do you want to file something in writing to -- this is kind of a thorny issue. I'm happy to take anything you have in writing, or you can respond orally now.

MR. VAIL: Yes, your Honor. I believe we can respond orally now, and if the Court thinks we should supplement that with writing.

But in short, the concern identified with the Attorney General's office is a concern that the Supreme Court at some point might decide to take their cert petition and reverse the decision of the 7th Circuit. That was the concern that they raised with Justice Kagan and the Supreme Court that she [14]rejected. They are now asking you to give them the relief that both the 7th Circuit and the Supreme Court denied them.

And as the Court points out, that was done, my guess, is because, as Mr. Silvertrust explained, Mr. Owens is sitting in prison without a valid conviction,

with the right to a speedy -- with -- we all agreed outside that at this point the clock should be ticking, the 120 days. So we can't be put in a place where state court proceedings have not been initiated, but our 120 days are starting. And we need discovery. We need a judge presiding over the issues in that matter.

This Court should issue a mandate sending this case back to the Cook County Criminal Court and let the presiding judge deal with the concerns, or counsel can reapproach the United States Supreme Court and say, "Here's where things are. If you're going to hear this, step down and stay this. I'm asking again."

But I don't think the appropriate step is for here today for a further stay to be entered in the face of that record.

THE COURT: All right. Anything else from the state?

MR. FISCHER: No, your Honor.

THE COURT: All right. Well, I'm going to -- can you provide me with a copy of the stay petitions you made to the 7th Circuit and to the Supreme Court?

MR. FISCHER: Yes, your Honor.

[15]THE COURT: All right. Let me see those. Were they responded to, or were they just denied without response?

MR. FISCHER: They were responded to, your Honor.

THE COURT: Why don't you give me a set of briefs.

MR. FISCHER: Yes, your Honor.

Just in terms of dealing with ECF on this type of filing, should I e-mail it to your chambers?

THE COURT: That's fine.

MR. FISCHER: Okay.

THE COURT: Yeah.

MR. FISCHER: Thank you, your Honor.

THE COURT: That's fine. You obviously have copies of it already, correct?

MR. SILVERTRUST: Yes, your Honor.

THE COURT: Okay. All right. I'd just like to read those. But I'm going to enter an order quickly on this because -- do you have witnesses? Have you started to do investigation of --

MR. GOLDEN: We have started the investigation to locate the witnesses, Judge.

THE COURT: Okay. You should.

MR. GOLDEN: Yes.

THE COURT: Because I am likely -- absent me reading something I don't expect to find -- to grant the writ and follow this order and then remand the case to the Circuit Court [16]of Cook County for trial. And I'll likely do that this week.

But I would like to get those briefs today, if possible, if I want to reread them.

MR. FISCHER: You will have them as soon as I return to the office.

THE COURT: But absent hearing any other argument on why I shouldn't, that's my intent.

Okay. Thank you all.

MULTIPLE COUNSEL: Thank you, your Honor.

THE COURT: Okay.

(Concluded at 10:00 a.m.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA *ex rel.* LAWRENCE OWENS,	)	No. 08 C 7159
	)	Judge Thomas M. Durkin
Petitioner,	)	
v.	)	
STEPHEN DUNCAN, Warden, Lawrence Correctional Center,	)	
Respondent.	)	

ORDER

Upon consideration of Respondent's Status Report dated July 21, 2015, the arguments presented to the Court at the July 28, 2015 conference, and the papers submitted by Respondent for the Court's review, it is hereby ordered that Respondent's request for an extension of time to initiate criminal retrial proceedings in state court pending a ruling on Respondent's petition for a writ of certiorari is DENIED. Pursuant to the grant of a writ of habeas corpus, Petitioner must be released from custody by no later than August 4, 2015, unless, on or before that date, the State of Illinois initiates retrial proceedings, pursuant to the Illinois Criminal Code,

in the Circuit Court of Cook County, Criminal Division.

ENTERED:

/s/ Thomas M. Durkin
Honorable Thomas M. Durkin
United States District Judge

Dated: July 29, 2015

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
vs.	)	CASE NO: 9
	)	
LARRY OWENS	)	

PEOPLE'S CONDITIONAL MOTION FOR REVESTMENT OF JURISDICTION IN THIS COURT TO COMPLY WITH THE ORDER OF THE SEVENTH CIRCUIT COURT OF APPEALS

Now come the PEOPLE OF THE STATE OF ILLINOIS, by their Attorney, ANITA ALVAREZ, State's Attorney of Cook County, through her Assistant, Michael Golden respectfully request this Honorable Court Conditionally Revest Jurisdiction of the instant matter in this Court. In support thereof, the People submit the following:

1. Defendant was charged with the First Degree Murder of Ramon Nelson under 99 CR 25287.

2. Following a bench trial before the Honorable Judge Joseph Macellaio, defendant was found guilty of First Degree Murder on November 8, 2000.

3. After Judge Macellaio denied defendant's post-trial motions, he sentenced defendant to 25 years in the Illinois Department of Corrections on January 12, 2001.

4. On direct appeal, the Illinois Appellate Court affirmed defendant's conviction and sentence. *People v. Owens*, 335 Ill. App. 3d 1191 (1st Dist. 2002).

5. Defendant filed a pro se postconviction petition on or about September 10, 2003. That petition was superseded by a supplemental petition filed by appointed counsel on June 16, 2008.

6. On December 15, 2008, prior to the resolution of his postconviction petition, defendant filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois. In that petition, defendant raised five separate grounds for relief.

7. On September 29, 2009, the defendant's postconviction petition was dismissed by the trial court without an evidentiary hearing.

8. The Illinois Appellate Court affirmed the dismissal of defendant's postconviction

petition on March 21, 2011. *People v. Owens*, 409 Ill. App. 3d 1157 (1st Dist. 2011).

9. On April 23, 2012, the Honorable Judge Rebecca Pallmeyer found that three of the claims raised by defendant were either noncognizable or were procedurally defaulted. In the same opinion, Judge Pallmeyer denied relief for defendant's claim that Judge Macellaio improperly based his decision on extra-judicial findings of motive for which there was no evidence. However, Judge Pallmeyer found that defendant's claims regarding ineffective assistance of counsel merited an evidentiary hearing. *U.S. ex rel. Owens v. Acevedo*, 2012 U.S. Dist. LEXIS 56890 (N.D. Ill., 2012).

10. On March 18 and 19, 2013, an evidentiary hearing was held on defendant's claims of ineffective assistance of counsel. The hearing was held before the Honorable Judge Thomas Durkin to whom the matter had been reassigned on January 14, 2013.

11. On February 11, 2014, Judge Durkin issued an opinion denying habeas relief to defendant. In addition, pursuant to Rule 11(a) of the Rules Governing section 2254 cases, Judge Durkin refused to issue a certificate of appealability in the case. *Owens v. Hodge*, 2014 U.S. Dist. LEXIS 16532 (N.D. Ill., 2013).

12. Despite the failure of the District Court Judges to issue a certificate of appealability, on March 23, 2015, the United States Court of Appeals for the Seventh Circuit reversed the District Court's denial of the petition for federal habeas corpus relief. Specifically, the court found that defendant was entitled to relief because Judge Macellaio relied on a motive for the killing for which no evidence was presented. *Owens v. Duncan*, 781 F.3d 360 (7th Cir., 2015)

13. The Seventh Circuit's opinion was based upon trial error and not on the sufficiency of the evidence presented at trial. The court gave "the state 120 days in which to decide whether to retry him. If it does not decide within that period to retry him, he must be released from prison." 781 F.3d at 366.

14. The Illinois Attorney General filed motions to stay the mandate in both the Seventh Circuit and the Supreme Court. Those motions were denied on March 30, 2015 and May 11, 2015, respectively.

15. At a status hearing on July 21, 2015 the Illinois Attorney General notified Judge Durkin that the People intend to retry defendant.

16. In a letter dated July 24, 2015, the Supreme Court of the United States ordered Defendant

to file a response to the Petition for Writ of Certiorari.

17. At a status hearing on July 28, 2015, the Illinois Attorney General asked Judge Durkin to stay the issuance of the mandate until the Supreme Court rules on the Petition for Writ of Certiorari.

18. On July 28, 2015, the Illinois Attorney General filed with the Supreme Court a second "Application to Recall and Stay Mandate Pending the Disposition of A Petition for Certiorari." In this filing, the Attorney General pointed out that a Petition for Certiorari was now on file in the case and that the Supreme Court had ordered the defendant to file a brief in opposition, despite defendant's previous notice to the Court that he did not intend to file such a brief. That Application was denied July 30, 2015 by Justice Kagan.

19. On July 29, 2015, Judge Durkin entered the following order:

> Upon consideration of Respondent's Status Report dated July 21, 2015, the arguments presented to the Court at the July 28, 2015 conference, and the papers submitted by Respondent for the Court's review, it is hereby ordered that Respondent's request for an extension of time to initiate criminal

> retrial proceedings in state court pending a ruling on Respondent's petition for a writ of certiorari is DENIED. Pursuant to the grant of a writ of habeas corpus, Petitioner must be released from custody by no later than August 4, 2015, unless, on or before that date, the State of Illinois initiates retrial proceedings, pursuant to the Illinois Criminal Code, in the Circuit Court of Cook County, Criminal Division.

20. On July 30, 2015 the Illinois Attorney General filed an "Application to Recall and Stay Mandate Pending the Disposition of A Petition for Certiorari" and, per the Rules of the Supreme Court, asked that this Application be directed to Justice Anthony Scalia. As of the date of this filing, Justice Scalia has not ruled on the Application.

21. In the case of a remand from an Illinois court of review, "The filing of the mandate in the circuit court vests that court with jurisdiction, and the speedy-trial period begins to run on the date that the mandate is filed and not the date that the mandate is issued by the appellate court." *People v. Jones*, 104 Ill. 2d 268, 284 (1984). To the best of the People's knowledge, neither the Seventh Circuit Court of Appeals nor the United States District Court has issued a mandate to the Circuit Court of Cook County.

22. While the Seventh Circuit certainly has the authority to order defendant's release from custody, that court does not have the authority to vacate defendant's judgment of conviction. See e.g. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) ("because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts."); *Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986) ("The State of Alabama correctly notes that a federal district court or court of appeals has no appellate jurisdiction over a state criminal case and hence has no authority to "remand" a case to the state courts. The federal habeas corpus statute provides a mechanism for collateral, not appellate review. A federal court, however, is authorized to grant a conditional writ of habeas corpus.")

23. A trial court is without jurisdiction to modify a final judgment more than 30 days after entry, or after an accused has begun to serve his sentence. See e.g. *People v. Adams*, 144 Ill. 2d 381, 393 (1991) ("once a defendant has been sentenced and placed into the custody of the Department of Corrections, the court rendering judgment and imposing sentence loses jurisdiction over the case and is without power to vacate, set aside[,] or modify the judgment") *People v. Lance*, 25 Ill. 2d 455, 185 N.E.2d 221 (1962) *Brockmeyer v. Duncan*, 18 Ill. 2d 502, 165 N.E.2d 294 (1960); *People v.*

Drysch, 311 Ill. 342, 143 N.E. 100 [(]1924) *People v. Rudecki*, 309 Ill. 125, 140 N.E. 832 (1923); *People v. Dzielski*, 130 Ill. App. 2d 581, 264 N.E.2d 426 (2nd Dist. 1970).

24. This court originally lost jurisdiction of the instant matter on February 11, 2001, which is thirty days after the date defendant was sentenced. This court obtained limited jurisdiction of this case on September 10, 2003 when defendant filed his petition for postconviction relief. This jurisdiction was limited to consideration of claims cognizable under the Post Conviction Hearing Act. However, this court once again lost jurisdiction on October 29, 2009, thirty days after this court's judgment dismissing the postconviction petition.

25. The only exception to this strict jurisdictional limitation is the "doctrine of revestment," which requires "(1) active participation by the parties; (2) without objection; (3) in proceedings inconsistent with the merits of the earlier judgment" *People v. Bailey*, 2014 IL 115459, P16 (Ill. 2014). Without revestment, the circuit courts are bound by the last state appellate court judgment, which in this case rejected the same claim and affirmed the conviction. See *People ex rel. Burris v. Progressive Land Developers. Inc.*, 151 Ill. 2d 285 (1992) ("Under the doctrine of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as

to the rights of the parties and their privies. That judgment is an **absolute bar** to subsequent actions involving the same claims or demands by the same parties or their privies.") (citations omitted, emphasis added).

26. Ordinarily, when a Federal Court grants habeas relief to a defendant and orders a retrial, the People move to vacate the underlying judgment of conviction and revest jurisdiction in the trial court.

27. The procedural posture of this case leaves the People in an untenable position. If the People agree at this time to vacate the judgment of conviction, then the pending Petition for Certiorari may be rendered moot. Further, even if the issue is not rendered moot and the Supreme Court ultimately grants the relief the People are seeking, it is unclear whether the judgment of conviction would be automatically reinstated. But see *People v. Mink*, 141 Ill. 2d 163 (1990) (holding that prior to sentencing a trial court has the jurisdiction to reverse its prior order granting a new trial but that after sentencing the court may not do so); *People v. Thompson*, 38 Ill. App. 3d 101 (1st Dist. 1976).

28. On the other hand, if the People fail to initiate a re-trial, the Illinois Department of Corrections must release a convicted murderer before the People have exhausted their right to seek review of the Seventh Circuit's order.

29. It is the People's intent to comply with the federal courts' orders without relinquishing the People's valid interest in seeking review of those orders by the Supreme Court of the United States.

30. In the event that the Supreme Court of the United States denies the relief sought by the Attorney General, either by denying the Petition for Writ of Certiorari or by affirming the decision of the Seventh Circuit Court of Appeals, then this court should vacate the judgment of conviction and the matter should proceed to a retrial. In other words, under those circumstances, the People would actively participate, without objection, in proceedings inconsistent with the validity of the judgment of conviction previously entered in this case.

31. If however, the Supreme Court ultimately reverses the decision of the Seventh Circuit Court of Appeals, then the defendant's original conviction and sentence should stand. That is, the People's willingness to participate in these proceedings is subject to the objection that the judgment of conviction should not be vacated unless and until the Supreme Court either denies the People's petition for writ of certiorari or affirms the Seventh Circuit Court of Appeals in this matter.

WHEREFORE, subject to the objections and limitations noted above, the People hereby request that this court grant the People Leave to File a Motion to Vacate Judgment of Conviction and that this court enter and continue this Motion pending the resolution of this matter in the Supreme Court. If the Supreme Court either denies the Petition for Writ of Certiorari or affirms the Seventh Circuit decision then the People request that the Motion to Vacate Judgment be granted instanter. If the Supreme Court ultimately reverses the decision of the Seventh Circuit Court of Appeals, the People request that this matter be stricken from the call and

this court's original order of conviction and sentence be enforced.

Aug. 4, 2015

Respectfully Submitted,

ANITA ALVAREZ
State's Attorney of Cook County

BY: /s/ Michael Golden
Michael Golden
Assistant State's Attorney

SHEET No.

LINE No.

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS)
)
VS) No. 99 CR 25287
)
LARRY OWENS)

REPORT OF PROCEEDINGS in the above-entitled cause taken before the Hon. JOSEPH G. KAZMIERSKI, Judge of said court, on August 4, 2015.

PRESENT:

HON. ANITA M. ALVAREZ,
State's Attorney of Cook County, by
MR. MICHAEL GOLDEN,
Assistant State's Attorney
representing the People;

MR. ANDREW VAIL, MR. SKYLER SILVERTRUST,
Private Attorneys,
representing the Defendant.

Victoria A. Wronski
Official Court Reporter
#084-001457

[2]THE CLERK: Larry Owens.

THE COURT: Who's here today?

MR. VAIL: Good afternoon, your Honor. My name is Andrew Vail. This is my colleague, Skyler Silvertrust. We're here in response to the motion that the State filed in the People v. Owens matter.

THE COURT: Okay. Mr. Owens is here, I understand, too?

MR. GOLDEN: That's correct.

MR. VAIL: That's my understanding.

THE COURT: Bring him out, John.

MR. GOLDEN: For the record, Judge, Assistant State's Attorney Michael Golden on behalf of the People.

(Defendant brought out.)

THE COURT: The matter of Larry Owens.

The People have a motion today. What is that?

MR. GOLDEN: Yes, Judge. The 7th Circuit appellate court had granted habeas corpus relief to Mr. Owens. We were ordered to first determine within 120 days whether we intended to re-try him, and we filed a paper with the federal court indicating that we did.

Judge Thomas Durkin then gave us to today to institute the proceedings to do that.

As your Honor knows, the federal courts do not [3]have appellate jurisdiction. So while they can tell us conditionally that we cannot detain Mr. Owens pursuant to the judgment of conviction, they do not have the authority to vacate that conviction.

Ordinarily, we would do that on our own motion, Judge, and set the case down for trial.

However, in this case, we have a pending petition for writ to the U.S. Supreme Court. The defendant had been ordered by the Supreme Court to respond to that. Our concern, your Honor, is that if we were to vacate the judgment at this point two things may occur. One, we may moot our petition for writ; and, two, that there is no guarantee that if we were successful that the conviction could be reinstated automatically.

So I would suggest, your Honor, that we re-vest jurisdiction in this court pursuant to this motion, have it then sent back out to Markham where it was originally tried. If in fact the 7th Circuit is affirmed

or if the petition for writ is denied, that the order of conviction be vacated nunc pro tunc to today's date. The speedy trial term, any of that stuff, discovery could take place and we would do that on a parallel track.

[4]And that's the state's position, your Honor.

THE COURT: Is the copy of the last order of the district court attached to your motion?

MR. GOLDEN: I have one, your Honor.

THE COURT: It looks like it's cited in Point 19. Is that the gist of it?

MR. VAIL: I have a copy, if it will be of assistance to counsel and the court.

THE COURT: Sure.

(Tendering.)

THE COURT: Okay.

You want to say anything else?

MR. GOLDEN: No, Judge, not at this time.

THE COURT: Counsel?

MR. VAIL: Thank you, your Honor.

Again, Andrew Vail on behalf of petitioner Owens.

Your Honor, on behalf of Mr. Owens, we object to the state's motion, and we do so first because we do not believe that it complies with the order of the district court or the order of the 7th Circuit.

And to provide this court some additional background, the state has now sought to take the fifth bite at the apple in regards to seeking some court to [5]stay what Judge Posner ordered happen. And how that has happened procedurally is after Judge Posner issued his order requiring the state to determine within 120 days that they would elect to re-try Mr. Owens, they proceeded to ask the 7th Circuit to stay that order so that they could have time to have the decision reviewed in the United States Supreme Court. The 7th Circuit rejected that argument and denied their request.

After that happened, they then filed a petition with Justice Kagan, the Supreme Court associate justice who presides over this circuit asking that the United States Supreme Court stay the order of Judge Posner. So for the reasons they've explained to this court today, they argue they need an opportunity to have the Supreme Court hear this case before it goes forward as ordered by Judge Posner. Justice Kagan denied that request.

They then sought a similar relief from Judge Durkin in the district court and that was when they filed their initial status report -- strike that -- their status report with Judge Durkin announcing their election to re-try Mr. Owens, but asking that Judge Durkin not send this case back to this court based on

the very same arguments they're making to this court [6]today, that they have concern that if this court as it should vacates the prior conviction and initiates these re-trial proceedings, that they may lose the ability to have the United States Supreme Court review Judge Posner and the 7th Circuit's decision.

Judge Durkin heard that argument. We have a copy of the transcript from those proceedings. And he denied, he rejected their request as you see in his order to stay, or for an extension of time to initiate criminal re-trial proceedings in the state court. He denied that. And he ordered them to come over here and to re-try these proceedings, or Mr. Owens be released under the grant of writ of habeas corpus.

After that, there was an application made to Justice Kagan to re-consider the denial of the stay, and Justice Kagan denied that request.

After that denial, your Honor, they asked that Associate Justice Antonin Scalia hear their petition and take the case essentially from Justice Kagan to grant their stay, and there's been no stay granted by the United States Supreme Court.

And that, your Honor, is the proper procedural mechanism by which the state could and should seek a stay of the 7th Circuit Court's order and mandate. They [7]have not obtained that relief, and it's not appropriate for them to come to this court now and ask this court to give them the relief they've been denied on those many occasions.

So first, I don't believe that this complies with what they're asking in their conditional motion to comply with the direction and orders of the federal courts.

Second, in this court, what it appears they're essentially asking this court to allow to happen is that Mr. Owens would remain incarcerated on a prior conviction that the 7th Circuit has found to be unconstitutional, yet at the same time they want to initiate re-trial criminal proceedings against Mr. Owens for that same crime.

That seems untenable, and frankly, it seems like it would violate other constitutional protections that Mr. Owens has under both the United States and the Illinois Constitution. It is not as they explain in both their arguments to the federal court and in their papers how a re-trial proceeding ordinarily happens in this court. And their failure to either obtain a stay from the 7th Circuit or the Supreme Court, or the decision to wait so long as to now have some argument [8]that they're now at attention in regards to moving forward with the re-trial proceeding or seeking appellate relief based on the 7th Circuit's argument, that that sitting on their hands, that the United States Supreme Court, that the 7th Circuit and Judge Durkin's refusal to grant them a stay does not in any way create an exception to the rules and allow them to attempt to go forward in a manner that's both not proper, nor in my view would be a constitutional way to attempt to re-try Mr. Owens for the same crime.

And therefore, your Honor, as I said, we object to the motion and we believe it does not comply with the federal court's orders.

THE COURT: Okay.

Who was the judge in the federal court on the original petition for relief under habeas corpus? Was that Judge Durkin?

MR. VAIL: No, your Honor, actually Judge Rebecca Pallmeyer had the case before Judge Durkin, before I believe Judge Durkin was on the bench --

THE COURT: Oh, yes. I see it.

MR. VAIL: -- and she ruled in part on the motion.

THE COURT: Okay. I see it.

Let me finish reading the rest of this, [9]please.

(Short pause.)

THE COURT: Okay.

All parties through saying what they want to say?

MR. GOLDEN: Yes, your Honor.

THE COURT: Okay.

I looked at the motion of the people today for re-investment of jurisdiction in this court to comply with an order of 7th Circuit Court of Appeals. I have before me the order of the Honorable Thomas M. Durkin basically placing this case in a position which it is today, namely that the petitioner must be released from custody no later than August 4, 2015, unless on or before that date, the State of Illinois initiates re-trial proceedings pursuant to the Illinois Criminal Code.

Based on the order of Judge Durkin, I'm going to allow the people's motion for re-vestment of jurisdiction in this court, and the matter will be transferred to the presiding judge for District 6 for re-assignment and any further proceedings.

Do the parties have a date you wish to go out there on?

[10]MR. GOLDEN: Can we have a moment, Judge?

(Short pause.)

MR. VAIL: Your Honor, before we, I do want for the record just to ask that the court briefly reconsider its ruling based on the re-vestment argument made by the state, because we do not believe that the authority the state cited to supports the ability to do that. And I do have that case, and the factors -- and I can provide the court a copy of that case -- and the factors that the courts are to consider, one element of that is there first be agreement by both sides that the prior judgment or

conviction is to be vacated, and that's not present here.

So I would ask for the court -- and I can a present a copy of the authority they rely on to reconsider granting the motion as filed by the state on that legal basis.

THE COURT: I'm following the order of the federal district court in my ruling, as part of my ruling. Okay?

MR. VAIL: Yes, your Honor.

THE COURT: When do the parties want to appear there?

MR. VAIL: We would like to appear next week, [11]Wednesday morning -- again, to preserve the record, over objection on behalf of the petitioner.

THE COURT: All right.

The 12th? What about the defendant's custody status now? The conviction was vacated, basically, right?

MR. GOLDEN: Well, that's the question, Judge. Are you vacating the conviction?

THE COURT: I'm not --

MR. GOLDEN: Well, we're asking --

THE COURT: You asked me to re-vest jurisdiction and transfer it to the presiding judge for re-assignment. That's what I've done.

MR. GOLDEN: In the motion, Judge, we asked that the motion be entered and continued to re-vest, so that the judgment itself was not vacated until we resolve that issue. I believe that's what --

MR. VAIL: That's the issue, your Honor That's my complaint about what they're trying to do.

THE COURT: Okay.

MR. GOLDEN: If your Honor is inclined to, or over that objection, or to vacate the judgment, then we would need to set bond and he would be remanded to the county sheriff. Because IDOC won't take him without a valid [12]judgment.

THE COURT: Right.

MR. VAIL: And your Honor, I apologize if I did not articulate that well enough during my argument that that is our very objection with what the state is proposing. If what the state would be proposing is as in the ordinary course, the prior conviction is vacated and this is assigned to a judge to preside over this case so that the retrial proceedings go forward as Judge Durkin ordered, we are not objecting to that. That is what we've asked the state to do.

Now, preserving all rights to the defenses and any other arguments we might make in front of that judge, we believe that that is the only appropriate

way for the state to go forward at this point now that the case is here.

THE COURT: To vacate the judgment and basically start all over again?

MR. VAIL: Yeah, 120 days start to run on the speedy trial, we get discovery, we have a judge presiding over the case. They're asking that it be held in abeyance.

THE COURT: How does holding it in abeyance comply with the order --

[13]MR. GOLDEN: -- trying to thread a needle, Judge, where we would be able to preserve our rights to Supreme Court review. After the Supreme Court has ordered the defendant to file a brief in opposition, which that order came after the defendant had said that we are not going to do it, Judge.

If your Honor disagrees with our position, then we'll vacate the judgment, and we'd ask for a bond hearing, and the case will be set over,

THE COURT: Well, if the judgment is not vacated I don't know why you're sending, how is it retrial proceedings being started then?

MR. GOLDEN: I understand your Honor's position.

THE COURT: You want retrial proceedings to be started, don't you?

MR. GOLDEN: Yes, Judge.

THE COURT: Okay.

The conviction is vacated pursuant to the order of the Federal District, Federal Appellate Court, and the matter will be transferred again then to the presiding judge, District 6, for re-assignment.

MR. GOLDEN: I believe, Judge, we need to set a bond now.

THE COURT: Yes.

[14]The defendant is going to be remanded to the Cook County Department of Corrections, officers. So we'll give you some paperwork for that.

What's your proffer with regard to the facts for purposes of bond?

MR. GOLDEN: The evidence of the first trial would show that on September 22, 1999, at approximately 8:30 p.m., the defendant was in the area of 15860 Dixie Highway, Markham, Illinois. At that time he saw the 17-year-old victim, Ramone [sic] Nelson on a bicycle. The defendant was armed with a baseball bat. He came up behind Ramone [sic] Nelson, struck him in the head approximately five times causing his death.

The defendant was identified by two separate eyewitnesses.

Bond -- the initial bond hearing was set at no bail.

At the time of this offense the defendant was on probation under 98 CR 28203. Two years of probation was entered on 2-24-99 for delivery of a controlled substance.

We ask that the no bail be reinstated, your Honor.

THE COURT: Counsel?

[15]MR. VAIL: Briefly, your Honor, to initially address the state's underlying case against Mr. Owens. As you've heard today, this is a case upon which, at which the 7th Circuit, a panel led by Judge Posner, threw out the conviction, threw out the conviction based on the failure of the trial judge to convict based on adequate evidence.

In fact, Judge Posner in his opinion has some very critical things to say about the state's case and the witnesses that were presented at that case. The case was solely two eyewitnesses who purported to identify Mr. Owens in dubious circumstances.

One of the witnesses I believe testified that he was providing that testimony in exchange for a deal from the state. Either he or the other eyewitness had problems making a consistent identification of Mr. Owens as the alleged offender.

So as a first matter, I'd say that the case as commented by Judge Posner appears to be very

weak, and therefore that that is one factor that should lead to a reduced or no bail for Mr. Owens who's been sitting in custody for close to 16 years on a conviction that the 7th Circuit held to be unconstitutional.

Mr. Owens obviously since he's been [16]incarcerated since that time for this crime has not in that time been out on the streets committing any other offenses.

For those reasons and -- if I could have one moment?

THE COURT: Sure.

(Short pause.)

MR. VAIL: And your Honor, Mr. Owens informs me if he was able to make bail, he would be able to live with his aunt in Country Club Hills.

THE COURT: Right now the court is setting a bond at $500,000 D, subject to review when it gets to the trial court, or whatever happens over there.

If other facts come to your attention or circumstances change, you'll know what to do in that regard.

The date will be August 12th. I'm going to set a time, I think 10:00 o'clock may be a good time for the parties to be before Judge Laws. When you get to that, the Markham courthouse, I'd go to her location

and they will be able to direct you where this may be held or heard at that time.

MR. VAIL: Yes, your Honor.

THE COURT: Remand to Cook County Department of [17]Corrections.

Anything else today?

MR. GOLDEN: No, Judge.

MR. VAIL: No, your Honor.

THE COURT: Okay.

The matter of Larry Owens is adjourned.

(Which were all the all the proceedings had in the above-entitled cause on said date.)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS CRIMINAL DIVISION/MUNICIPAL DEPARTMENT-DISTRICT

PEOPLE OF THE STATE OF ILLINOIS	)	No:	99CR2528701
	)	SID	029500660
vs	)		
	)	IR	0868896
LARRY OWENS	)		

ADDENDUM TO PREVIOUS ORDER SETTING BAIL AND COMMITTING THE DEFENDANT TO THE COOK COUNTY DEPARTMENT OF CORRECTIONS FOR FAILURE TO DEPOSIT BAIL.

ORDER

THIS MATTER COMING BEFORE THE COURT AND THE COURT BEING FULLY ADVISED IN THE PREMISES, IT IS HEREBY ORDERED:

NEXT COURT DATE: 08/12/2015

MURDER
DEF REMANDED TO CCDOC
BOND SET AT $500,000 (D)
TRANSFER TO PRESIDING JUDGE DIST 6 FOR REASSIGNMENT

DISPOSITION(S) MUST REFLECT WHICH COUNT(S) THE ORDERS(S) IS/ARE APPLICABLE

ENTERED AUGUST 04, 2015

DEPUTY CLERK /s/ V. Wimberly

V

Wimberly

VERIFIED BY _____

/s/ Joseph G. Kazmierski, Jr.
Judge Kazmierski, Joseph G. Jr. 1629

ROOM 101
ROOM/BRANCH
AT 0930 AM

DOROTHY BROWN
CLERK OF THE CIRCUIT COURT OF COOK COUNTY

GCPJ 08/04/15 15:46:28
CCCR N707

COURT FILE

Sheet #	Defendant Sheet #	CRIMINAL DISPOSITION SHEET	Branch/Room/Location	CLERK USE ONLY
0136	0001 OF 0001		1701 101 PAUL J. [Illegible], JR [illegible] MARKHAM	0136

CASE NUMBER	DEFENDANT NAME	ATTORNEY	COURT DATE	COURT CALL/TIME
99CR2528701	OWENS LARRY		08-04-2015	[Illegible] –0930 AM

CB/DON #	IR #	EM	BOND #	I	C	D	BOND AMOUNT
L12861019	0868896						

CHARGES	* IN CUSTODY 06/12/09 *	COURT ORDER ENTERED	Misc.	CODES

[Illegible]
MURDER/INTENT TO KILL/[ILLEGIBLE]

[Illegible]
MURDER/[ILLEGIBLE]/INJUR

[Illegible] jurisdiction allowed

[Illegible] vacated

Transfer [Illegible] to presiding judge

Div 6 for reassignment Record of
[illegible] CCDOC

Bond [Illegible] $500,000 D

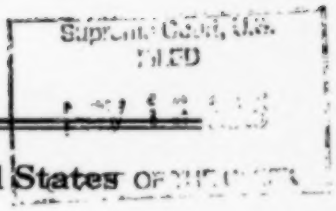
BA 8/12/15 [Illegible]

JUDGE:
/s/ [Illegibe]

JUDGE'S No.

RESPONSIBLE FOR CODING AND COMPLETION BY DEPUTY [ILLEGIBLE]

No. 14-1516



In the Supreme Court of the United States

STEPHEN DUNCAN, Warden,

PETITIONER,

v.

LAWRENCE OWENS,

RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR PETITIONER

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Solicitor General
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Attorneys for Petitioner

QUESTION PRESENTED

Section 2254(d)(1) of Title 28 of the United States Code requires that any claim adjudicated on the merits in state court be contrary to, or an unreasonable application of, clearly established Supreme Court precedent before habeas relief may be granted. In this case, Respondent was convicted of murder at a bench trial, and in announcing the verdict, the trial judge made an inference concerning Respondent's motive, which was not an element of the crime. Respondent claimed that the judge made improper "extrajudicial" findings regarding his motive and thus found him guilty based on evidence not produced at trial. The state appellate court upheld Respondent's conviction, holding that the trial court's inference regarding motive, if error, was harmless. The Seventh Circuit overturned Respondent's conviction on habeas corpus review, finding that the trial court's inference about motive violated Respondent's right to have his guilt adjudicated solely on the evidence introduced at trial, relying on Supreme Court decisions involving juries exposed to impermissible information or influences, and finding the error not harmless.

Did the Seventh Circuit violate 28 U.S.C. § 2254 and a long line of this Court's decisions by awarding habeas relief in the absence of clearly established precedent from this Court?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit granting habeas relief (App. 1a-10a) is reported at 781 F.3d 360. The memorandum opinions of the United States District Court for the Northern District of Illinois denying relief (App. 11a-55a (denying habeas relief on Respondent's ineffective assistance of counsel claim and declining to issue a certificate of appealability on all claims) & App. 56a-90a (denying habeas relief in part, including on the claim at issue here), are unpublished but are reported at 2014 WL 539125 and 2012 WL 1416432. The order of the Illinois Supreme Court denying leave to appeal on postconviction appeal (App. 91a) is reported at 955 N.E. 2d 477 (Table) (Ill. 2011). The unpublished opinion of the Illinois Appellate Court affirming Respondent's judgment of conviction on postconviction appeal (App. 92a-95a) is unreported. The order of the Illinois Supreme Court denying leave to appeal on direct appeal (App. 96a) is reported at 788 N.E. 2d 733 (Table) (Ill. 2003). The unpublished opinion of the Illinois Appellate Court affirming Respondent's judgment of conviction on direct appeal (App. 97a-129a) is unreported.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Seventh Circuit entered judgment in this case on March 23, 2015. App. 1a-10a. Petitioner timely filed a petition for certiorari with this Court on June 22, 2015, which this Court granted on October 1, 2015. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1).

STATEMENT

On the evening of September 22, 1999, in Markham, Illinois, Respondent Lawrence Owens attacked Ramon Nelson and beat him with a baseball bat (or something similar). App. 98a. Nelson died from his injuries the next day. *Ibid.*, JA13. Respondent was convicted of the murder at a bench trial in the Circuit Court of Cook County, Illinois, on November 8, 2000. App. 97a.

The Evidence and Trial

At trial, both the prosecution and the defense emphasized that the main issue in the case was the identification of Nelson's killer. *E.g.*, JA110 (State's closing argument); JA116 (defense closing argument). The State presented two eyewitnesses: Maurice Johnnie and William Evans. Although there were some inconsistencies in their testimony, App. 119a, they independently identified Respondent as the assailant in photo-arrays at the police station on September 28, 1999, JA63, JA68-69, which was less than a week after the murder; line-ups at the police station a month after the photo-array, JA65, JA68-69; and in court, JA26, JA81. As the Illinois Appellate Court noted, "[t]here is no evidence that Johnnie and Evans knew each other or had any reason to conspire and fabricate their testimony." App. 120a.

Trial Testimony about the Attack

Both Johnnie and Evans testified that they saw Respondent attack Nelson. JA26, JA83. They both stated that they saw Respondent's face, and they both reiterated that the area was well-lit. JA18-19, JA31-32, JA42-44, JA51-52, JA80.

Maurice Johnnie's testimony

Johnnie testified that sometime after 8:00 p.m. on September 22, 1999, he was in the front passenger seat of his own car, parked ten feet from the entrance to Mackie's Lounge, which was also a liquor store. JA17, JA18. Johnnie's friend Johnny Morgan was in the driver's seat, and they were waiting for a friend of Morgan's who had gone into the store. JA17, JA19.

Nelson, who was on a bicycle, pulled up alongside the driver-side door and began speaking with Morgan. JA20. They spoke for three to five minutes, after which Nelson rode his bike past the front of the car, onto the sidewalk, and towards the entrance to Mackie's. JA20-21.

When Nelson was about eight feet from the entrance of the liquor store, Johnnie saw a man he later identified as Respondent walking down the sidewalk toward Nelson. JA22. As Nelson tried to turn around, Respondent caught up with him and hit him on the head with a wooden stick or baseball bat. JA23. Johnnie saw Respondent hit Nelson twice. JA24. After the first blow, Nelson, who was still on his bike, fell backwards into the doorway of the liquor store. *Ibid.* As Nelson lay on the ground, Respondent hit him on the head with the bat a second time and then left in the direction he had come from. *Ibid.* From a distance of about eight feet, Johnnie had a clear look at Respondent's face as he walked away. JA52. Although the sun had gone down, it was not completely dark and the area was well-lit. JA18-19.

William Evans's testimony

Around 8:00 p.m. on September 22, 1999, Evans was on the northeast corner of the block on which

Mackie's is located, when he saw Nelson, whom he knew, riding a small bicycle. JA76-78. Like Johnnie, Evans testified that it was not yet fully dark and there were lights coming from the liquor store. JA80. After Evans and Nelson spoke for thirty minutes, Nelson rode off toward the lounge's front entrance, where he stopped and sat on his bike near the liquor store doors. JA79.

Evans saw Respondent and another man walk up to Nelson and start talking to him. JA80-81. Evans did not know them by name, but he saw their faces and recognized both men from having seen them previously around Mackie's. JA80. Respondent was carrying a baseball bat. JA81.

Evans kept a bucket with cleaning materials nearby, which he used to wash cars. JA79, JA82. He was retrieving his bucket when he heard something that sounded like wood splitting. JA79, JA82. Evans looked back and saw Respondent hit Nelson with the bat twice on the head as Nelson lay on the ground near the entrance to the liquor store. JA83-84. After Evans yelled, "Hey, what is going on," Respondent and the second person fled. JA84.

The Identifications

Johnnie and Evans each independently identified Respondent as Nelson's killer on three different occasions: in a photo-array a week after the attack, in a line-up a month after that, and at trial. JA26, JA63, JA65, JA68-69, JA81.

On September 28, 1999, Johnnie went to the Markham police station and gave the police a description of Nelson's assailant. JA37. Detective Terry White, who had been assigned to investigate Nelson's

murder, assembled a photo-array of six pictures. JA58-59, JA63. Johnnie identified a picture of Respondent as Nelson's attacker. JA63. Evans likewise identified Respondent as the killer from a photo-array on September 28, 1999. JA68-69.

On October 27, 1999, Johnnie and Evans independently picked Respondent out of a line-up at the Markham police station. JA65, JA68-69. Respondent was the only person who appeared in both the photo-array and in the line-up. JA45, JA71.

At trial, both Johnnie and Evans identified Respondent as Nelson's attacker. JA26, JA81. Evans was asked to identify the photograph he had picked out of the photo-array. JA86. He pointed to a picture of someone other than Respondent. *Ibid.* (identifying photo #2; the picture of Respondent was photo #4, JA63). But when shown a photograph of the line-up he had viewed at the police station, Evans pointed to Respondent as the man he had identified. JA87. Johnnie likewise identified Respondent as the person he had selected when he was shown a picture of the line-up. JA35.

The Investigation and Arrest

After Johnnie and Evans identified Respondent from the photo-array on September 28, 1999, Detective White informed other police officers that Respondent, also known as Big O, was wanted in connection with a murder investigation. App.100a. One of those officers was Officer Mike Alexander.[1] *Ibid.*

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[1] Officer Alexander testified at a pretrial hearing on Respondent's motion to quash his arrest. App. 98a, 100a-101a. That motion was denied, App. 101a, and is not at

On October 26, 1999, Officer Alexander was in an unmarked squad car when he saw a blue Mercury Topaz speed by, traveling 50 miles an hour in a 20 mile-an-hour zone. *Ibid.* Alexander turned on his lights and sirens, but the Topaz did not stop. *Ibid.* Instead, it sped up and ran a stop sign. *Ibid.* Eventually the Topaz pulled over, and Respondent jumped out and started running. *Ibid.* Alexander chased after him on foot and caught him when they both ran out of breath approximately a block and a half later. *Ibid.* Alexander arrested Respondent for speeding and for driving without a license and took him to the Markham police station. *Ibid.* Alexander told Detective White that Respondent was in custody. App. 101a. Detective White then arranged the line-ups that Johnnie and Evans witnessed. JA64-65, JA68.

Additional Stipulations and Witness Examination

The parties stipulated that when he was attacked, Nelson, who was seventeen years old, JA11, had forty small plastic bags of crack cocaine in his coat pocket. JA107, App. 109a, 118a.

Both the prosecution and the defense brought out the fact that Evans was receiving favorable sentencing recommendations from the State on two drug-related matters in exchange for testifying truthfully. JA76, JA96-99. Specifically, Evans was facing a charge of possession of a controlled substance with intent to deliver that threatened to violate his probation for an earlier conviction for delivery of a controlled substance.

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issue here. At trial, the parties stipulated that if called to testify, Officer Alexander would testify as he had at the pretrial hearing. JA56.

JA75. In exchange for his truthful testimony, the State agreed to recommend continued probation for both offenses. JA76. On redirect examination, the prosecution showed that Evans's trial testimony was consistent with his grand jury testimony, which occurred before the arrest giving rise to his current legal troubles. JA102-104.

The End of the Trial and the Verdict

The defense rested without presenting evidence. JA110. During closing arguments, both the prosecution and the defense emphasized that the key issue in the case was the identity of the killer. JA110, JA116. The defense attempted to cast doubt on Johnnie's and Evans's identifications of Respondent in part by pointing to a mole on Respondent's face. JA121-122, JA127 Since they both had clear, well-lit views of the killer's face, the defense argued, if Respondent had in fact been the killer, Johnnie and Evans would have described the killer as having the mole, and they did not. JA121-122, JA127. Neither the prosecution nor the defense discussed motive during the closing arguments. JA110-133.

After the closing arguments, the trial court stated:

> I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.

JA133. The court sentenced Respondent to twenty-five years of imprisonment. App. 110a.

Direct Appeal

On direct appeal, Respondent argued, *inter alia*, that the trial court made improper "extrajudicial" findings regarding his motive and based its finding of guilt on evidence not produced at trial. R1638-1640. The Illinois Appellate Court affirmed Respondent's conviction. App. 127a. It noted the presumption that in a bench trial "the trial judge considered only competent evidence in reaching his verdict." App. 118a (citing *People v. Worlds*, 400 N.E.2d 85 (Ill. App. 1980)). The appellate court did not rest on that presumption alone, however; it considered the evidence that was before the trial court, acknowledged the discrepancies between Johnnie's and Evans's testimony, and noted the weaknesses in Evans's credibility. App. 119a. The court also considered the reliability of Johnnie's identification of Respondent and concluded that, in light of his opportunity to view Respondent during the attack, his high degree of attention to the attacker, the consistency of his description with Evans's, his certainty about his identification, and the timeframe between the incident and the photo-array and line-up, his testimony was reliable. App. 120a-122a; see also App. 117a (discussing factors this Court identified in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), for evaluating reliability of eyewitness testimony).

In sum, the appellate court held that "despite the contradictions between their testimony, both Johnnie and Evans put defendant at the scene of the crime and both identify defendant as Nelson's assailant. There is no evidence that Johnnie and Evans knew each other or had any reason to conspire or fabricate their testimony." App. 120a. It concluded that, "in light of these identifications, the trial court's speculation as to

defendant's motive for assaulting Nelson, will be construed as harmless error." *Ibid.* One justice dissented, App. 127a-129a, finding the presumption that judges follow the law rebutted, App. 128a, and arguing that the trial judge's "unsupported insinuations" were not harmless because the eyewitness identification "was marginal" and the judge showed no indication he was aware of this "impropriety," App. 129a.

Respondent's discretionary petition for leave to appeal to the Illinois Supreme Court claimed that the trial judge made improper "extrajudicial" findings regarding Respondent's motive, abandoning the other claims presented on direct appeal. R1775-1793. On April 2, 2003, the Illinois Supreme Court denied Respondent's petition for leave to appeal. App. 96a.

State Postconviction Petition

Next, Respondent filed a pro se postconviction petition in the Illinois trial court, R3, and counsel filed supplemental petitions, R1798-1827, R1886-1893. These petitions raised claims not at issue here. R1798-1799. The state trial court dismissed all of Respondent's claims. R1911.

Respondent appealed the denial of his postconviction petition, and the Illinois Appellate Court affirmed. App. 94a. Respondent filed a petition for leave to appeal, R429-440, which the Illinois Supreme Court denied, App. 91a.

Federal Habeas Petition

While his postconviction appeal was pending, Respondent filed the habeas petition underlying this proceeding, arguing, *inter alia*, that the trial court

made improper "extrajudicial" findings regarding Respondent's motive and based its finding of guilt on evidence not produced at trial. R7 The district court held that Respondent had failed to identify "any Supreme Court precedent that the Appellate Court allegedly applied in an unreasonable or contrary way," App. 76a, as required for habeas relief under § 2254(d) of AEDPA, 28 U.S.C. § 2254(d). The district court also held that even if Respondent could identify any Supreme Court precedent violated by the trial court's inference as to motive, the appellate court's harmless error finding was a reasonable application of *Chapman v. California*, 386 U.S. 18 (1967). App. 76a-77a. The district court denied habeas relief on this and all other grounds raised in the habeas petition and declined to issue a certificate of appealability on any ground. App. 11a-55a.

Subsequently, the Seventh Circuit granted a certificate of appealability solely on the question of whether Respondent's due process rights were violated because the trial judge relied on "extra-record facts" in determining Respondent's guilt. Cir. Doc. 11. On March 23, 2015, the appellate panel issued its opinion granting Respondent habeas relief under 28 U.S.C. § 2254. App. 1a-10a.

In that decision, the Seventh Circuit opined that there are substantial doubts about the reliability of eyewitness evidence generally, although it acknowledged that the eyewitness identifications in this case "could * * * have supported a finding beyond a reasonable doubt that Respondent had murdered Nelson." App. 4a. But the Seventh Circuit felt that "it is highly uncertain" whether the trial court found that evidence was sufficient because that court's only

explanation of its verdict focused on the motive for the murder, leading the Seventh Circuit to conclude that the trial judge "appears to have been thoroughly confused." App. 8a. Had the evidence been "overwhelming," the Seventh Circuit continued, the trial judge's comments regarding motive "could be disregarded as goofy but harmless," but here "the entire case pivoted on two shaky eyewitness identifications." *Ibid.*

The Seventh Circuit was "mindful that only clearly established violations of a defendant's constitutional rights permit [the court] to reverse a state court decision challenged in a federal habeas corpus proceeding." App. 9a-10a. Citing cases from this Court in which a jury was exposed to information or influences other than properly introduced evidence of defendant's guilt, as well as two circuit precedents, the Seventh Circuit concluded that the state trial judge's inference as to Respondent's motive violated Respondent's due process "right to have [his] guilt or innocence adjudicated on the basis of evidence introduced at trial." App. 10a. It also held that the error was not harmless under the standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), because the trial judge's declaration that motive was the "real issue" "had to have had" a "malign influence" on the verdict. App. 9a. The Seventh Circuit then granted habeas relief. App. 10a.

This Court granted certiorari on October 1, 2015.

SUMMARY OF ARGUMENT

Relief under § 2254 of AEDPA was not proper because the Illinois Appellate Court's adjudication of Respondent's claim was not contrary to, or an unreasonable application of, clearly established law as determined by this Court. More specifically, this Court has never held that a trial judge's inferences regarding motive, which is not an element of the crime of murder, is a violation of a criminal defendant's right to due process, even if those inferences are not directly established by the trial evidence. Nor did the Seventh Circuit point to any such clearly established precedent from this Court when it granted habeas relief under § 2254. Instead, the Seventh Circuit violated this Court's unmistakable admonition against framing the issue at too high a level of generality when determining whether there is clearly established law, and it relied on authority that did not address Respondent's claims. For this basic reason, AEDPA's highly deferential standard was not satisfied and the grant of habeas relief was not justified.

Additionally, the trial court's inference about Respondent's motive for murdering Nelson, even if unsupported, was harmless. There was ample evidence before the court, including eyewitness identifications and Respondent's flight from police, that Respondent committed the murder. In light of that evidence, the judge's inference about motive does not cast grave doubt on the verdict. Moreover, in reaching the result below, the Seventh Circuit misapplied the AEDPA standards and contradicted the state court's explicit finding that there was reliable eyewitness testimony supporting Respondent's guilt. For these reasons, the Seventh Circuit's decision should be reversed, and

Respondent's claim does not warrant federal habeas relief.

ARGUMENT

I. The Seventh Circuit Granted Habeas Relief In Violation Of § 2254(d) of AEDPA.

The "starting point" in considering a petition for habeas corpus "is to identify the 'clearly established Federal law, as determined by the Supreme Court of the United States' that governs the habeas petitioner's claims." *Marshall v. Rodgers*, 133 S. Ct. 1446, 1449 (2013) (per curiam) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). AEDPA makes this requirement explicit. 28 U.S.C. § 2254(d)(1). If no such precedent exists, then in a case like this one, where the state courts considered the claim on the merits, no habeas relief is available. *Rodgers*, 133 S. Ct. at 1449.

This requirement serves the "important interests of federalism and comity," under which "federal judges are required to afford state courts due respect by overturning their decisions only when there can be no reasonable dispute that they were wrong." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam). As this Court has emphasized, federal habeas review of state convictions is "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011).

AEDPA puts this principle into practice by restricting habeas relief to narrowly defined circumstances. Where, as here, a state court has already considered and rejected a claim on the merits, a federal court must first determine, based solely on

the record before the state court, whether that court's rejection of the claim was contrary to, or an unreasonable application of, United States Supreme Court precedent. *Cullen v. Pinholster*, 563 U.S. 170, ___, 131 S. Ct. 1388, 1400 (2011); *Rodgers*, 133 S. Ct. at 1449; see 28 U.S.C. § 2254(d)(1); see also, *e.g.*, *Donald*, 135 S. Ct. at 1378 (reversing grant of habeas due to no clearly established precedent); *Glebe v. Frost*, 135 S. Ct. 429, 430-32 (2014) (per curiam) (same); *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam) (same); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (same); *Wright v. Van Patten*, 552 U.S. 120, 124-26 (2008) (per curiam) (same). As this Court has recently reiterated, this standard is "highly deferential." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015). And "where the precise contours of a right remain unclear, state courts enjoy broad discretion in their adjudication of" a habeas petitioner's claims. *White v. Woodall*, 134 S. Ct. 1697, 1705 (2014) (internal quotation marks and citations omitted).

The Seventh Circuit failed to follow this requirement. Because no precedent of this Court holds that a finder of fact violates a defendant's due process rights when it infers a motive (especially where motive is not an element of the crime), Respondent is not entitled to habeas relief, and this Court should reverse the judgment of the Seventh Circuit.

A. No clearly established precedent of this Court holds that the trier's inference regarding motive, which is not an element of murder, violates a defendant's due process rights.

The Seventh Circuit failed to heed AEDPA's commands. Respondent claims that his due process

rights were violated when the trial judge relied on "extrajudicial" information to find him guilty. But no precedent of this Court clearly establishes that a defendant's constitutional rights are violated when the trier of fact draws an inference regarding a fact that is not an element of the crime. And it is undisputed that motive is not an element of the crime of murder in Illinois. See 720 ILCS 5/9-1(a) (1998)[2] (defining first degree murder in Illinois); *People v. Hobbs*, 220 N.E.2d 469, 472 (Ill. 1966) (holding that motive is not an element of murder).

The cases on which the Seventh Circuit relied do not address Respondent's claim and thus cannot support relief under AEDPA. See *Donald*, 135 S. Ct. at 1377 ("Because none of our cases confront the specific question presented by this case, the state court's decision could not be contrary to any holding from this Court.") (internal quotation marks and citations omitted). More specifically, all of the cases from this

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[2] In 1999, section 5/9-1 of the Illinois Criminal Code defined first degree murder, in relevant part, as follows:

(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another * * *

720 ILCS 5/9-1(a) (1998); see also 720 ILCS 5/9-1(a) (2000) (same statutory text).

Court that the Seventh Circuit discussed, see App. 2a, 10a,—*Taylor v. Kentucky*, 436 U.S. 478 (1978), *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986)—involved juries that were exposed to prejudicial and improper information or influences from which guilt could be inferred. None of them supports relief under § 2254(d).

In *Taylor*, for example, this Court held that the right to a fair trial was violated where the prosecution invited the jury to infer defendant's guilt from the fact that he had been arrested and indicted and where the court provided inadequate instructions regarding the State's burden of proof. 436 U.S. at 485-88. But *Taylor* addressed a different question from that at issue here. First, unlike the defendant in *Taylor*, Respondent here had a bench trial, not a jury trial, and judges are presumed to know and follow the law and to be less susceptible to considering improperly admitted evidence than are juries. See *Williams v. Illinois*, 132 S. Ct. 2221, 2235 (2012) (noting presumption under both Illinois and federal law) (citing *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (per curiam)). Second, the State in this case did not invite the trial judge to infer Respondent's guilt from any improper basis, as the prosecution did in *Taylor*.

The Seventh Circuit's reliance on *Estelle v. Williams*, 425 U.S. 501, is similarly misplaced. *Estelle* held that the right to a fair trial was violated where the defendant was compelled to appear before the jury in prison attire, but found no violation occurred where the defendant failed to object. 425 U.S. at 512. But, again, Respondent has never argued that any similarly prejudicial factor influenced the verdict at his bench trial.

The final case on which the Seventh Circuit relied, *Holbrook v. Flynn*, 475 U.S. 560, is even further afield. There, this Court held that the right to a fair trial was *not* violated by the presence of additional, uniformed security personnel in the courtroom. 475 U.S. at 572. *Flynn* thus offers no support for Respondent's claim.

The Seventh Circuit claimed that these cases meet AEDPA's "exacting standard" and described them as holding that "a judge or a jury may not convict a person on the basis of a belief that has no evidentiary basis whatsoever." App. 10a. But this description of the cases fails to heed this Court's repeated warning that the lower courts should not "frame[] the issue at too high a level of generality" in discussing whether a principle is clearly established enough to support habeas relief. *Donald*, 135 S. Ct. at 1377; see also *Smith*, 135 S. Ct. at 4 ("caution[ing] the lower courts against 'framing our precedents at such a high level of generality' ") (quoting *Nevada v. Jackson*, 133 S. Ct.1990, 1994 (2013) (per curiam)). Likewise, this Court has emphasized that only its holdings, not dicta, are relevant for purposes of determining what is clearly established. *Williams v. Taylor*, 529 U.S. at 412.

Not only has this Court repeatedly warned against such generalizations and inferences, but it has specifically rejected an attempt to generalize from the holdings of *Estelle* and *Flynn* themselves—the very cases relied on by the Seventh Circuit—in factual circumstances much closer to them than the circumstances presented here. In *Musladin*, the habeas petitioner argued that his right to a fair trial was violated when members of the victim's family sat in the front row of the gallery during trial wearing buttons

with the victim's picture on it. 549 U.S. at 72. The state court denied this claim. *Id.* at 73. The Ninth Circuit subsequently granted habeas relief, holding that the state court's opinion was contrary to the rule of federal law clearly established by *Estelle* and *Flynn*. *Ibid.*

This Court reversed, holding that *Estelle* and *Flynn* addressed only "the effect of state-sponsored courtroom practices on defendants' fair-trial rights," *id.* at 75,—in *Estelle*, holding due process violated by forcing a defendant to appear before the jury in prison garb, 425 U.S. at 512, and in *Flynn*, denying relief where extra uniformed security personnel were in the courtroom, 475 U.S. at 572. As a result, this Court held that those cases did not clearly establish that similarly prejudicial *spectator* conduct could violate a defendant's right to a fair trial. *Musladin*, 549 U.S. at 75-76.

The distinction between Respondent's claim here and the rule established by *Estelle* and *Flynn* is even starker: those cases cannot be said to clearly establish any rule under which Respondent is entitled to relief because he does not argue that any such prejudicial factor influenced the verdict. Instead, Respondent is complaining about the trial judge's thought processes, even as he ignores the presumption that judges know and follow the law, see *Williams v. Illinois*, 132 S. Ct. at 2235; *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) That distinction precludes reliance on those cases as "clearly established" law "as determined by" this Court, as AEDPA requires.

Where, as here, this Court has never clearly held that Respondent's claim (or one very close to it) established a violation of his federal constitutional rights, the state court could not have unreasonably

applied clearly established Supreme Court precedent in denying him relief, see, *e.g.*, *Van Patten*, 552 U.S. at 125; *Musladin*, 549 U.S. at 77, and the Seventh Circuit erred in concluding otherwise.

B. The Seventh Circuit wrongly relied on its own precedent in determining what is clearly established law for purposes of AEDPA.

The Seventh Circuit also pointed to two of its own decisions, *United States v. Moore*, 572 F.3d 334, 341 (7th Cir. 2009), and *United States v. Garcia*, 439 F.3d 363, 366-68 (7th Cir. 2006), in support of its acceptance of Respondent's claim. App 2a, 10a. But circuit precedent cannot satisfy AEDPA's requirement of clearly established law. *Smith*, 135 S. Ct. at 1 ("We have emphasized, time and again, that [AEDPA] prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is 'clearly established.' ") (citing *Rodgers*, 133 S. Ct. at 1450-51); see also *Frost*, 135 S. Ct. at 430; *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (per curiam). Nor may a court "canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Cicuits that it would, if presented to this Court, be accepted as correct." *Rodgers*, 133 S. Ct. at 1451. *Moore* and *Garcia* are thus irrelevant to the § 2254(d) analysis.

Even if reliance on Seventh Circuit precedent were appropriate, *Moore* and *Garcia* do not support, much less clearly establish, the legal merits of Respondent's claim. Like *Estelle*, *Flynn*, and *Taylor*, both *Moore* and *Garcia* involved juries, not judges, as triers of fact. And in *Moore*, while the court recited the general principle that "[g]uilt beyond a reasonable doubt cannot be

premised on pure conjecture," 572 F.3d at 341, it *upheld* a conviction in which the jury had to infer a variety of connections between different pieces of evidence and disregard other evidence to accept the government's theory of the case, *id.* at 337-41. Likewise, the *Garcia* court uncontroversially observed that the presumption of innocence means that a jury cannot be "encouraged (or allowed) to consider facts which have not been received in evidence." 439 F.3d at 367. But *Garcia* also upheld the conviction over the defendant's challenge to expert testimony that, he claimed, encouraged an inappropriate inference of his guilt. *Id.* at 368 (distinguishing *Taylor*, 436 U.S. at 484-90). Neither case supports Respondent's claim. In fact, they both rejected arguments that verdicts cannot be upheld where the trier of fact made inferences from the evidence before it. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (holding that it is finder of fact's responsibility to draw reasonable inferences from evidence).

C. The Seventh Circuit contorted the trial judge's statement and, in doing so, wrongly rejected the Illinois Appellate Court's reasonable findings of fact.

Perhaps recognizing the lack of clearly established Supreme Court precedent, the Seventh Circuit engaged in a labored (and ultimately unsuccessful) effort to conform Respondent's claim to existing precedent, in part by mischaracterizing the state trial judge's remarks. The Seventh Circuit wrongly concluded that the trial judge found the State's evidence insufficient to convict and that the verdict was based solely, or at least primarily, on the judge's inference that

Respondent knew that the victim was a drug dealer. App. 8a-9a. But the judge explicitly referred to "the State's evidence" in rendering his verdict. App. 4a-5a. That the trial judge also inferred from the State's evidence a motive, which is not an element of the crime, while noting that the witnesses had all "skirted" that issue, does not negate the fact that he relied on "the State's evidence" to convict Respondent. *Ibid.*

In light of that evidence, the Seventh Circuit's suggestion that the trial court found Respondent guilty based solely or primarily on a ground not supported by the record, App. 6a-7a, is implausible. The trial judge was presented with not one, but two, eyewitnesses who had repeatedly identified Respondent as Nelson's killer both before and during the trial, as well as Respondent's own desperate flight from police when Officer Alexander attempted to pull him over for a traffic violation. With this evidence before it, the trial court inferred the motive to explain *why* Respondent committed the murder. But he would have had no reason to do so if the evidence had not convinced him that Respondent in fact committed the crime.

Moreover, a conclusion that the trial judge invented the motive as the primary reason for finding defendant guilty would fly in the face of the Illinois Appellate Court's reading of the very same record. In reviewing the judge's remarks, it relied on the presumption "that the trial judge considered *only* competent evidence in reaching his verdict." App. 118a (citing *Worlds*, 400 N.E.2d at 87) (emphasis added). This presumption is even more appropriate for a federal court reviewing a state trial judge's actions on habeas. See *Visciotti*, 537 U.S. at 24 (noting "presumption that state courts know and follow the

law" and "§ 2254(d)'s highly deferential standard for evaluating state-court rulings, * * * which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted). And the Illinois Appellate Court concluded that the competent evidence before the judge supported the verdict. App. 119a-122a.

To be sure, the finder of fact must find all *elements* of a crime proven beyond a reasonable doubt based on the evidence introduced at trial. See, *e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970). But the Seventh Circuit did not rely on *Winship* or any other precedent in that line of cases. Nor has Respondent argued in his habeas proceedings that the evidence was insufficient with respect to any element of his crime of murder. Here, there was evidence of every element—that Respondent killed Nelson, that he intended to kill him or do great bodily harm, and that he knew that his acts would cause, or had a strong probability of causing, death or great bodily harm. 720 ILCS 5/9-1(a) (1998); see *supra*, 16 n.2. Thus, even if, as the Seventh Circuit found, App. 4a-5a, the facts as stated by the trial court—that Respondent knew the victim was a drug dealer and, as the Seventh Circuit put it, that Respondent wanted to kill him for that reason—were "nonsense," App. 5a, because they are not necessary to establish the elements of first degree murder, Respondent cannot prevail.

Any argument about the sufficiency of the evidence, moreover, is forfeited because Respondent failed to argue it in any federal court. See, *e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (finding arguments not raised below forfeited); *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (deeming waived

nonjurisdictional argument not raised in federal appeals court or in brief in opposition to this Court); see also Supreme Court Rule 15.2.

II. The State Appellate Court's Harmless Error Holding Must Be Upheld.

Even were this Court to find that the Illinois Appellate Court's holding conflicted with, or was an unreasonable application of, this Court's precedent, Respondent still would not be entitled to relief because any error was harmless. In the "absence of the rare type of error that requires automatic reversal," *Ayala*, 135 S. Ct. at 2197, habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice,'" *Brecht*, 507 U.S. at 637 (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)). "There must be more than a 'reasonable possibility' that the error was harmful." *Ayala*, 135 S. Ct. at 2198 (quoting *Brecht*, 507 U.S. at 637). Instead, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). In contrast, the Seventh Circuit was prepared to hold any error harmless only if it found the evidence of defendant's guilt "overwhelming." App. 8a.

Moreover, where the state court has made a harmlessness determination, that harmlessness determination itself must be "unreasonable" for habeas relief to issue, and the deterimination "is not unreasonable if 'fairminded jurists could disagree on its correctness.'" *Ayala*, 135 S. Ct. at 2199 (quoting *Richter*, 562 U.S. at 101). A habeas petitioner thus "must show that the state court's decision to reject his

claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Richter*, 562 U.S. at 103).

The Illinois Appellate Court made a determination of harmlessness. App. 120a. Because this decision "undoubtedly" constitutes an adjudication on the merits, see *Ayala*, 135 S. Ct. at 2199, the highly deferential AEDPA standard applies, and the state court's determination cannot be overturned unless it is contrary to, or an unreasonable application of, *Chapman*, 386 U.S. 18. Here, the state court's determination should be upheld because it was not so lacking in justification that it was beyond the possibility for any fairminded disagreement. See *Ayala*, 135 S. Ct. at 2199.

To start, the Illinois Appellate Court's finding of harmless was not unreasonable because the evidence against Respondent was substantial. Both Johnnie and Evans identified Respondent as Nelson's killer not once, but three times each. And the Illinois Appellate Court, while acknowledging weaknesses and inconsistencies in Evans' testimony, carefully analyzed Johnnie's testimony with respect to the factors that this Court has held are indicia of an eyewitness's reliability. App. 117a, 119a-122a (citing and applying *Biggers*, 409 U.S. at 199-200). The state court explicitly found that Johnnie's identification was reliable. App. 120a.

In particular, the Illinois Appellate Court noted that Johnnie testified that the murder occurred just eight feet away from where he sat in the passenger seat of his vehicle, that the area was well lit, and that he saw Respondent's face immediately before and after

the attack. App. 102a, 104a. Johnnie's description of the attacker was consistent with both Respondent's physical appearance and Evans's testimony regarding Respondent's appearance on the night of the murder. App. 103a-104a. Less than a week after the attack, Johnnie identified Respondent in a photo-array, and he subsequently identified Respondent both in a line-up and in court, each time expressing a high degree of certainty in his identification. App. 103a. In addition, Johnnie's testimony was largely corroborated by Evans, who testified that he saw Respondent beat Nelson with a baseball bat, App. 106a-107a, who said that he knew Respondent's face because he had previously seen him at the liquor store, App. 107a, and who, like Johnnie, identified Respondent as Nelson's killer on three separate occasions.

And these factual determinations by the Illinois Appellate Court are entitled to substantial deference under AEDPA. As § 2254(e)(1) specifies, "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Although the Illinois Appellate Court relied on these facts to conclude expressly that Johnnie's testimony was reliable, App. 121a, the Seventh Circuit improperly ignored that conclusion to find prejudicial error. Instead of presuming the Illinois Appellate Court's determination to be correct, as required by AEDPA, the Seventh Circuit improperly dismissed Johnnie, along with Evans, as a "shaky" witness. App. 9a. This refusal to credit the state court's conclusions alone warrants reversal of the Seventh Circuit's grant of habeas relief.

Additionally, the reasonableness of the Illinois Appellate Court's harmlessness determination is

demonstrated by other evidence supporting the trial judge's conclusion that Respondent was Nelson's killer. Specifically, Officer Alexander testified that Respondent attempted to flee, first by car and then on foot, when Alexander attempted to pull him over for speeding. App. 100a. See *People v. Lewis*, 651 N.E.2d 72, 93 (Ill. 1995) (flight can be evidence of consciousness of guilt); *Illinois v. Wardlow*, 528 U.S. 119, 136 (2000) (quoting *Hickory v. United States*, 160 U.S. 408, 419-20 (1896)) (same).

This strong evidence of Respondent's guilt, combined with the fact that the trial court's inference related to a non-element of the crime, establishes that the alleged error could not have had a substantial and injurious effect or influence on the verdict resulting in actual prejudice to Respondent. See *Brecht*, 507 U.S. at 637. It cannot be said that no "fairminded" jurist could agree with the Illinois Appellate Court's conclusion here. See *Ayala*, 135 S. Ct. at 2199 (citing *Richter*, 562 U.S. at 103). Any error was harmless, and Respondent is not entitled to habeas relief.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

STEPHEN DUNCAN, WARDEN,
Petitioner,

v.

LAWRENCE OWENS,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INTRODUCTION

On November 8, 2000, after a bench trial in Cook County Circuit Court that took less than a day, the court convicted Lawrence Owens of the murder of Ramon Nelson. The state and the defense agreed that the case "boils down to identification." JA110-11; *see also* JA115-17, 129-30.[1] The state called two eyewitnesses, Maurice Johnnie and William Evans, who contradicted each other and the lone testifying officer in important particulars. Announcing its ruling, the trial court criticized rather than credited the witnesses, and expressly based its guilty finding on facts with no evidentiary support in the trial record:

> After hearing this case, I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.

JA133. The state's evidence *did* prove that Mr. Nelson was a drug dealer: The police recovered forty small baggies of cocaine from his coat pocket. JA107. The state's evidence did *not* prove that Mr. Owens knew Mr. Nelson was a drug dealer, or even that he knew Mr. Nelson at all. The state put on no evidence

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[1] Citations to the Joint Appendix are to JA__; to the Appendix to the Petition for a Writ of Certiorari are to App. __; and to the Record are R__.

of any connection between the two men. The state's evidence also did *not* prove that Mr. Owens "wanted to knock [Mr. Nelson] off." JA133. The state put on no evidence that Mr. Owens was involved with drugs or with gangs, or that Mr. Owens had any reason to want to "knock off" Mr. Nelson. No physical evidence linked Mr. Owens to the attack. App. 119a-120a.

At the outset, it is important to clarify what this case is about and, equally important, what this case is not about. Mr. Owens was not tried to a jury, and this case is not about jury trials or jury verdicts. Nor does this case present for consideration any issue concerning any general requirements for how courts must decide criminal bench trials or what they must say, if anything, in announcing their verdicts. This appeal presents only the unusual circumstance in which the trial court stated on the record that it was finding the defendant guilty based upon key facts that had no support in the trial record.

This Court has held time and again, in a variety of circumstances, that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial and not on ... circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *accord*, *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986); *Estelle v. Williams*, 425 U.S. 501, 503 (1976). "In the constitutional sense, trial ... in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's

right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965).

Petitioner does not dispute the existence or fundamental nature of the right to have one's "guilt or innocence determined solely on the basis of the evidence introduced at trial." *Taylor*, 436 U.S. at 485. But Petitioner urges this Court to overlook the trial court's blatant violation of that fundamental due process right because Petitioner claims that this Court has not seen another case in which a trial court has violated this Court's clearly established due process rights in exactly this fashion. That is not what 28 U.S.C. § 2254(d) requires.

Petitioner's brief opens with the suggestion that the trial court's ruling may not even have been error. *See*, Pet. Br. i ("if error"). The state appellate court held the ruling was error, although a two-to-one majority mistakenly adjudged that error harmless. In its order of December 4, 2002, the appellate court held:

> The State attempts to justify the trial court's comments by arguing that the comments were based upon the evidence.... However, there was no evidence presented that defendant knew Nelson was dealing drugs, and there was no evidence presented that defendant was involved with gangs or the illegal drug trade.

App. 118a-119a. The state appellate court admonished the trial court, "in a case such as this, where there is no physical evidence linking

defendant to the crime and the identity of the perpetrator of the charged crime is at issue and defendant's conviction rests upon eyewitness identification testimony – every effort should be made to assess the credibility of the eyewitnesses, resolve any conflicts in their testimony, weigh the evidence and draw reasonable inferences therefrom." App. 120a.

Nevertheless, the appellate court did not remand to the trial court to make those assessments in Mr. Owens's case. Rather, it dismissed the trial court's error as harmless, despite substantial problems with the eyewitness testimony at trial, testimony that, as the dissent noted, the trial court "never stated that he relied on...." App. 128a.

As the dissent's observation highlights, this is a unique case meriting the grant of habeas relief: "What we do have is a trial court manufacturing, supplying, and interjecting its own evidence into a trial and then affirmatively stating on the record that this manufactured evidence constituted the basis of its verdict. I fail to comprehend how such conduct can be regarded as 'harmless error.'" App. 128a-129a. Under *Brecht v. Abrahamson*, 507 U.S. 619 (1993) and *Davis v. Ayala*, 135 S. Ct. 2187 (2015), this judicially–manufactured evidence had a substantial and injurious effect on the trial court's finding of guilt, causing Mr. Owens actual prejudice, and the state appellate court's affirmance was unreasonable. Issuance of the writ should be affirmed.

STATEMENT OF THE CASE

1. Trial

On September 22, 1999, Ramon Nelson was attacked with a wooden stick or baseball bat outside of Mackie's Lounge and liquor store in Markham, Illinois. App. 98a. Mr. Nelson subsequently died from his injuries. App. 98a. Mr. Owens was indicted for the murder of Mr. Nelson and tried before Judge Macellaio in Cook County Circuit Court on November 8, 2000. JA5. The entire bench trial took less than a day. JA6-133. There was no physical evidence linking Mr. Owens to the crime scene. App. 120a. The state's case depended on the testimony of two eyewitnesses. App. 119a.

a. Maurice Johnnie

The state's questioning of its first eyewitness, Mr. Johnnie, concerning the night of September 22, 1999 began with Mr. Johnnie sitting with his friend Johnnie Morgan ("Mr. Morgan") in Mr. Johnnie's car in the parking lot at Mackie's, a liquor store and lounge in Markham, Illinois, a southern suburb of Chicago. JA16. Although the car was Mr. Johnnie's, Mr. Morgan was driving. JA16-17 Mr. Morgan also witnessed the events at issue but did not testify at trial. JA16, 20, 26-27 Asked why Mr. Morgan was driving, Mr. Johnnie testified that Mr. Morgan "was a friend of mine, and he washes and clean my car, I let him drive it." JA17 They were with a third person in Mr. Johnnie's car, whom Mr. Johnnie said was a friend of Mr. Morgan's that Mr. Johnnie did

not know. JA17 This person left the car before the attack began. JA19.

A "crowd" of "[a]bout four or five" people were congregated to Mr. Johnnie's left in front of Mackie's. JA40. Mr. Johnnie testified that from that crowd, the victim, Mr. Nelson, rode over on a bicycle to Mr. Johnnie's car and spoke with Mr. Morgan for what Mr. Johnnie estimated to be three to five minutes. JA20, 39-40. Mr. Johnnie testified that he did not know Mr. Nelson, JA20, but that Mr. Nelson "seemed to be an admirer of him, of [Mr.] Morgan." JA39. After Mr. Nelson's conversation with Mr. Morgan ended, Mr. Johnnie testified, Mr. Nelson bicycled up to the front of Mr. Johnnie's car, turned right, and encountered a solitary person, about 10 to 12 feet or more away to the north of Mr. Johnnie's car. JA40-42.

As this person approached Mr. Nelson, Mr. Johnnie "did not see anything in his hands." JA23. Mr. Johnnie reported that Mr. Nelson began to turn his bicycle around; at that time the assailant suddenly hit Mr. Nelson with a wooden stick or baseball bat, twice while Mr. Nelson was up on the bicycle and once more after he had fallen, into the doorway of Mackie's liquor store about ten feet from Mr. Johnnie's car. JA23-25. Apparently the assailant's back was turned towards Mr. Johnnie during at least part of the attack; Mr. Johnnie testified that he got his best chance to look at the assailant "[a]s he turned away from the kid and was walking away " JA52.

After the attack, Mr. Johnnie and Mr. Morgan got out of the car and went to see Mr. Nelson. JA26. According to Mr. Johnnie, "other people came around, and they suggested that we take him to the hospital," which Mr. Morgan and Mr. Johnnie did. JA27 Mr. Johnnie stayed outside the hospital door and avoided talking to the hospital personnel; only Mr. Morgan spoke with them. JA48-49. As soon as Mr. Morgan brought the victim into the hospital, Mr. Johnnie and Mr. Morgan got back into the car to leave. JA48-49.

When initially asked on cross-examination whether he had spoken to police at the hospital, Mr. Johnnie responded: "There was no police at the hospital." JA36-37 Later in the examination, however, Mr. Johnnie conceded that the police arrived at the hospital while he was still there: "The police had pulled up the same time" he and Mr. Morgan were in his car about to leave the hospital. JA49. They stayed in the car, and Mr. Johnnie did not speak to the police there. JA50-51. Mr. Johnnie testified that Mr. Morgan shouted to the police from the car that they had brought the victim to the hospital and then they drove back to Mackie's. JA48-51.

Mr. Johnnie testified that the decision to return to Mackie's was Mr. Morgan's, JA46, and that Mr. Johnnie had "[n]ot really" wanted to go back there, JA48. Initially Mr. Johnnie testified "I don't know why he went back to Mackie's." JA46. Mr. Johnnie later speculated: "Well, actually the third person in the car we had left him at Mackie's, and I can't

remember. He was not there when we came back to Mackie's." JA47.

When Mr. Morgan and Mr. Johnnie got back to Mackie's, "there was an officer there." JA36. Again, Mr. Johnnie avoided talking to the police:

Q. Did you talk to that officer?

A. [Mr. Morgan] spoke to the officer.

Q. Thank you. Sir, I need to ask you, please. Did you talk to the officer?

A. No, I did not talk to the officer.

JA36; *see also* JA54 (claiming that "we told the police that we saw what happened" but then admitting that "Johnnie [Morgan] told the police that" and "I did not.").

Mr. Johnnie never contacted the police; instead, the police came to his house six days later, on September 28, 1999, and only then did he go to the police station. JA53-55. Mr. Johnnie testified that at the police station, he gave Detective Sergeant Terry White of the Markham Police Department a very general description of the attacker as "approximately two hundred forty pounds and around 6'2." JA44-45. Mr. Johnnie also testified that after he gave this description, Sergeant White "showed me a book" of photographs. JA44. Sergeant White stated that he showed Mr. Johnnie a photo-array of only six photographs, and that Mr. Johnnie selected a photograph of Mr. Owens from that array. JA57-59.

Approximately five weeks after the attack, Sergeant White had Mr. Johnnie view a lineup of five people, and Mr. Johnnie identified Mr. Owens as the assailant. JA33-35, 65-66. Mr. Johnnie testified that only one person who was in the photo-array was also in the lineup, *i.e.*, Mr. Owens. JA45. Sergeant White, who also conducted the lineup, confirmed that Mr. Owens was the only individual who appeared in both the photo-array and the lineup. JA71.

b. William Evans

The only other eyewitness to testify at Mr. Owens's trial was William Evans. JA74. Before providing his recollection of the events of September 22, 1999, Mr. Evans informed the trial court that he was currently incarcerated for a pending charge of possession of a controlled substance with intent to deliver, which had occurred while he was on probation from a previous conviction for delivery of a controlled substance. JA75. As Mr. Evans explained, in return for his testimony in Mr. Owens's case, the state had agreed to recommend a sentence of probation in his new drug case, and that he be re-committed to probation for his previous conviction despite his probation violation. JA76.[2]

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[2] In addition, stipulations were entered concerning Mr. Evans's meeting with Assistant State's Attorneys regarding the testimony he would provide during Mr. Owens's trial, JA108, as well as a transcript of Mr. Evans's grand jury testimony, JA109, and the cooperation deal Mr. Evans reached with the state, JA108-109.

Mr. Evans testified that on the night of September 22, 1999, he had been on the corner of the block where Mackie's was located and had spent between thirty minutes to an hour talking to someone he referred to as "Kermit," previously identified as the victim, Mr. Nelson. JA11, 76-78. Although Mr. Evans did not specify exactly the time at which the events at issue occurred, he noted "[i]t was just a little bit after dark, but it was not really dark yet." JA80. After their discussion concluded, Mr. Evans testified, he saw Mr. Nelson bike in front of Mackie's and begin talking with two individuals Mr. Evans had seen before but did not know by name. JA79-80. At trial, Mr. Evans said that, just before they began talking with Mr. Nelson, he had seen the two individuals arrive together at Mackie's, walking from the north. JA79. Mr. Evans was impeached by defense counsel on his trial testimony about where these two individuals came from before encountering Mr. Nelson with his grand jury testimony, however. There, Mr. Evans had testified that these two people "were leaving from Mackie's" when they stopped to talk to Mr. Nelson. JA102.

One of these two individuals Mr. Evans identified at trial as Mr. Owens. JA79-81. Mr. Evans claimed that individual had a baseball bat in his hand, and that at the moment Mr. Evans looked away, bending down to retrieve a bucket of water (with which, he said, he was going to wash a car) he heard "a sound like some wood was being split or broken." JA81-82. Looking up, Mr. Evans testified he saw Mr. Nelson being hit with the bat, and shortly thereafter, two

assailants fled the scene, running past Mr. Evans as they made their escape. JA82-85. Mr. Evans did not claim to have seen the assailants' faces as they ran past him; he was focused on Mr. Nelson at the time. JA85.

Mr. Evans testified he had briefly spoken to the police the night of the incident and told them one of the two assailants was taller than he was and the other was about his height (5'9"); he said the police did not ask for, and he did not provide, any further description that night. JA94-96.

Mr. Evans viewed the same photo-array on the same day as Mr. Johnnie with Sergeant White at the Markham Police Station. JA68, 85-86. During trial on November 8, 2000, the state showed Mr. Evans that photo-array. JA86. Despite the presence of Mr. Owens in the courtroom wearing a "DOC uniform," JA83, and Mr. Evans's claim that he recognized the assailants "[f]rom previous times being around by the store," JA80, when asked in court to pick out the photograph of the assailant he had selected at the police station, Mr. Evans twice identified the photograph of a person other than Mr. Owens. *Compare* JA86 (Mr. Evans selecting the "second" photograph as the assailant) *with* JA63, 68-69 (Sergeant White testifying that photograph "four" was Mr. Owens).

In late October 1999, approximately five weeks after the incident, Mr. Evans identified Mr. Owens in the same lineup that Mr. Johnnie viewed. *See* JA66-68. Thus, Mr. Owens was the only person in both the

photo-array and lineup that Mr. Evans viewed. JA71.

During his direct examination, Mr. Evans testified that he had not seen either Mr. Johnnie's car or the people in it at the scene before he helped put the victim into the car to go to the hospital. JA88. Mr. Evans reiterated that assertion on cross-examination:

> "Q. You never saw this car parked directly in front of Mackie's two entranceways, is that correct?
>
> A. I didn't see the car until we were putting [Mr. Nelson] into the car."

JA94. On redirect, the state impeached Mr. Evans with his grand jury testimony to the contrary. JA103.

c. Other Trial Evidence And Argument

In addition to Mr. Johnnie and Mr. Evans, the only other witnesses who testified during trial were Barbara Nelson, the victim's mother, who identified her son, but did not testify that she knew Mr. Owens or that she was aware of any connection between her son and Mr. Owens, JA9-14, and Sergeant White, who testified regarding the eyewitnesses' identifications of Mr. Owens, JA57-72. The parties stipulated to the admission of testimony from the hearing on the motion to quash the warrantless arrest of Mr. Owens given by Officer Michael Alexander, who arrested Mr. Owens about a month after the incident, on October 26, 1999. JA56; App.

98a. Officer Alexander did not arrest Mr. Owens for the murder of Mr. Nelson. Instead, Officer Alexander arrested Mr. Owens after spotting him speeding; he gave chase when Mr. Owens did not pull over. App. 100a. The parties also stipulated to the cause of Mr. Nelson's death. JA105-06. The only other substantive evidence presented during trial was the stipulation that Officer Lee Dean, if called as a witness, would have testified that at the hospital "he recovered a clear plastic bag from the coat worn by Ramon Nelson." JA107. In the bag, Officer Dean would have testified, he found "forty smaller plastic bags, each of which contained an off white rocky substance[,] ... which tested positive for the presence of cocaine." JA107.

The state presented no physical evidence linking Mr. Owens to the attack and no confession. No witness testified, and the state presented no evidence, that Mr. Owens knew that Mr. Nelson was a drug dealer, or that Mr. Owens even knew Mr. Nelson at all. No witness testified to any connection at all between Mr. Owens and Mr. Nelson. No evidence was introduced that Mr. Owens had any involvement at all in the drug trade, or that Mr. Owens had any reason for wanting to kill Mr. Nelson, either because of Mr. Nelson's drug dealing or for any other reason. App. 119a-120a.

At the close of the evidence, the trial court denied defense counsel's motion for a directed verdict. JA110. The defense immediately rested. JA110.

During closing argument, the state summed up its case succinctly: "Judge, it boils down to

identification. I think it is very clear that is the issue at this point." JA110. The state then discussed the evidence upon which it was relying in seeking Mr. Owens's conviction. As regards Mr. Johnnie's testimony, the prosecutor noted, "[h]e sat there. He saw the baseball bat. He saw the defendant's face. He saw the defendant clubbing Ramon Nelson with the baseball bat. ... [Mr. Owens] is the individual who did it, and he was identified again by Mr. Johnnie." JA111. Recounting Mr. Evans's testimony, the prosecutor again emphasized that Mr. Evans had testified: "[T]he defendant is the one with the bat. The defendant is the one that is hitting Ramon Nelson. The defendant is the one that flees. The defendant is the one [Mr. Evans] picks out of the photo-array himself." JA115. In finishing his closing, the prosecutor once more stated: "I can't reiterate enough about the identification, how they identified him and where, and what they did." JA115.

In rebuttal, the prosecutor again commented, "Judge, this is a case about identification, and in this case identification equals recognition." JA130.

The trial court then pronounced its verdict:

> After hearing this case, I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.

JA133. On December 4, 2000, Mr. Owens timely moved for a new trial, raising various objections to the evidence introduced against him and the strength of the state's case. R1541-43. Of relevance here, Mr. Owens claimed "[t]he court erred in infusing its theory of the case without any evidence before it to allow the reasonable inference for such theory." R1542. The trial court denied Mr. Owens's motion for a new trial. App. 110a.

2. State Court Direct Appeal

Mr. Owens timely appealed his conviction. R1686. Among other issues, he argued that the "trial court's baseless, extrajudicial findings denied defendant a fair trial." R1638 (capitalizations omitted). Specifically, Mr. Owens argued that "the trial court expressly found that defendant knew that the victim was dealing drugs and wanted to 'knock him off,' despite the State's failure to offer evidence as to defendant's knowledge of the victim, let alone any motive or any involvement in a drug or gang scheme." *Id.*

The state appellate court agreed, in an unpublished order, that the trial court had committed an error in finding facts not supported by record evidence. App. 97a-129a. The court observed "there is no indication whether or not the trial court assessed the credibility of the eyewitnesses, resolved conflicts in their testimony, or weighed the evidence or drew reasonable inferences therefrom." App. 118a. Moreover, the appellate court noted "there is no physical evidence linking defendant to the crime and the identity of the perpetrator of the charged

crime is at issue and defendant's conviction rests upon eyewitness identification testimony...." App. 120a. The appellate court further acknowledged that "[i]t is true that Johnnie and Evans contradict each other on some points regarding the event," – noting specifically that Mr. Evans claimed there were two assailants while Mr. Johnnie testified there was only one – "and the reliability of Evans' testimony is severely called into question." App. 119a, 119a n.2.

Nevertheless, a two-to-one majority upheld the verdict, opining that "Johnnie's identification testimony is reliable and sufficient enough to support the trial court's guilty verdict," App. 119a-120a, even though the trial court never credited that identification. The appellate court held "the trial court's speculation as to defendant's motive for assaulting Nelson, will be construed as harmless error." App. 120a.

Justice South dissented, and would have overturned the verdict. App. 127a-129a. Justice South focused on the trial court's stated basis for convicting Mr. Owens, noting "the record affirmatively demonstrates that the court reached its verdict solely based upon defendant's purported motive." App. 128a. Thus "[w]hat we do have is a trial court manufacturing, supplying, and interjecting its own evidence into a trial and then affirmatively stating on the record that this manufactured evidence constituted the basis of its verdict." App. 128a-129a. Justice South deemed the eyewitness identifications "marginal at best" given that Mr. Evans's testimony was "doubtful and highly

suspect" – all the more so in light of Mr. Evans's cooperation agreement and selection of the photo of someone other than Mr. Owens at trial – and that the trial court "never stated that [it] relied on [Mr. Johnnie's] identification or other properly admitted evidence." App. 127a-129a. Justice South concluded: "I fail to comprehend how such conduct can be regarded as 'harmless error.'" App. 129a. Justice South would have held that "justice and fundamental fairness demand that defendant be afforded a new trial free from such prejudice." App. 129a. Mr. Owens raised the trial court's extrajudicial finding in his petition for leave to appeal to the Illinois Supreme Court, *see* R1776-77, 1791-92, but the Illinois Supreme Court denied the petition, *see* App. 96a.

3. State Post-Conviction Proceedings

Mr. Owens filed a *pro se* petition for state post-conviction relief on September 10, 2003; five years passed without a ruling before an attorney filed a supplemental petition.[3] R507 In these petitions, Mr. Owens argued that his trial attorney had been constitutionally ineffective and that he was actually innocent. *See* R507-08.

In December 2008, with his state post-conviction petition still pending in those proceedings, Mr. Owens filed a *pro se* petition for habeas relief in federal district court under 28 U.S.C. § 2254. R1.

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[3] As the district court noted, no copy of petitioner's *pro se* petition from 2003 appears in the record, but it is uncontested that Mr. Owens filed it.

Thereafter, in an oral ruling on September 29, 2009, the state trial court finally denied Mr. Owens's state post-conviction petition. R339. Mr. Owens appealed. In federal court, the state moved to dismiss Mr. Owens's federal petition for failure to exhaust his state court remedies. R65-75. On March 9, 2010, the district court denied that motion, observing that "despite [Mr. Owens's] diligence 'in making contact with his lawyers, seeking information from them, and urging action,' the state trial court had taken more than six years to rule on the petition, and no further ruling was in sight." R508 (quoting Mar. 9, 2010 Minute Order).

On March 21, 2011, the Illinois Appellate Court summarily affirmed the denial of Mr. Owens's state post-conviction petition. *See* App. 92a-95a. The appellate court denied Mr. Owens's petition for rehearing on June 22, 2011, and the Illinois Supreme Court denied his petition for leave to appeal on September 28, 2011. R426; App. 91a.

4. Habeas Corpus Proceedings In The District Court

With Mr. Owens's lengthy state post-conviction process finally resolved, the district court adjudicated his federal habeas petition. In his December 2008 *pro se* habeas petition, Mr. Owens raised five claims for relief.[4]

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[4] As the district court recounted them, Mr. Owens claimed that:

> (1) the long delay in resolution of his state court postconviction petition violated his due process rights; (2) there was no probable cause to arrest him; (3) the trial court should have suppressed the photo-array

Mr. Owens's fourth claim asserted that his "5th and 14th amendment[] right[s]" were violated "due to the fact[] that the trial court's findings of (guilt) [were based on] extrajudicial findings regarding alleged motive to commit the crime charged denied the petitioner a fair and impartial trial ... especially where the trial court, in fact, based its finding of guilt, on evidence that was not produced at, or during the court proceedings and trial." R7.

The district court rejected Mr. Owens's extrajudicial findings claim on the merits. R513-14. In recounting the facts of the case, the district court observed "[i]t is unclear from the record what evidence the court considered in support of this finding. Certainly, there was evidence that [the victim] dealt drugs.... There is also evidence that at least one of the prosecution's two witnesses was involved in the illegal drug trade. No other record evidence suggests that Owens knew [the victim] was a drug dealer, however, or that Owens himself was involved in drug trade." R503. Nevertheless, the district court determined "it is not unreasonable for the appellate court to determine the error of motive

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and lineup evidence because it was improperly suggestive; (4) the trial court made improper 'extrajudicial' findings regarding Owens's motive, basing its finding of guilt on evidence not produced at trial; and (5) trial counsel provided ineffective assistance of counsel.

R510. The district court resolved the first three claims against Mr. Owens on motions and the fifth after an evidentiary hearing. R510-12, R522-23.

speculation as harmless beyond a reasonable doubt." R514.

The district court declined to issue a certificate of appealability on any of Mr. Owens's claims. R1959. On April 23, 2014, Mr. Owens timely filed a *pro se* "request for certificate of appealability" raising, *inter alia*, his challenge to the trial court's extrajudicial findings. 7th Cir. Dkt. 10 at 9-12. On May 12, 2014, the Seventh Circuit granted a certificate of appealability, finding Mr. Owens had "made a substantial showing of the denial of his right to due process by the trial court's reliance on extra-record facts when deciding Owens' guilt." 7th Cir. Dkt. 11. The Seventh Circuit then appointed *pro bono* counsel to represent Mr. Owens on appeal. 7th Cir. Dkt. 12.

5. Appeal To The Seventh Circuit

A unanimous panel of the court of appeals reversed, granted the writ of habeas corpus, and gave the state 120 days in which to decide whether to retry Mr. Owens. App. 1a-10a. The court noted: "No evidence was presented that Owens had known Nelson, used or sold illegal drugs, or had any gang affiliation. If Owens had had any record of involvement in the illegal drug trade, or in gangs, the prosecution would, one imagines, have presented evidence of that involvement; it did not." App. 3a. The court further observed: "Also absent was any physical evidence (such as fingerprints on the baseball bat) pointing to Owens as the murderer." App. 3a. Quoting the trial court's expressed reason for convicting, the court of appeals noted the trial court's dissatisfaction with the state's witnesses ("'all

of the witnesses skirted the real issue,'" App. 4a) and that "he thought that Owens' knowledge that Nelson was a drug dealer was *the* fact that dispelled reasonable doubt of Owens' guilt." App. 5a (court's emphasis). The court then correctly recited and applied the *Brecht* standard for harmless error and concluded that "Owens has satisfied this standard. ... The trial court's singling out as the only explanation for the verdict a 'fact' having no evidentiary support, and declaring it the 'real issue' in resolving the case, had to have had such a[] [substantial and injurious] influence." App. 9a.

Finally, the court addressed Section 2254(d)'s "clearly established" standard and held "there's no question that the right to have one's guilt or innocence adjudicated on the basis of evidence introduced at trial satisfies that exacting standard." App. 9a-10a. In support, the court cited "the Supreme Court decisions in *Holbrook*, *Taylor*, and *Estelle*, and our own *Garcia* and *Moore* decisions," App. 10a; *see also* App. 2a.

SUMMARY OF ARGUMENT

The Antiterrorism and Effective Death Penalty Act (AEDPA) authorizes federal courts to grant habeas corpus relief where the adjudication of a state criminal proceeding has resulted in a decision contrary to, or involving an unreasonable application of, clearly established federal law as determined by this Court. As the court of appeals correctly concluded, Mr. Owens's conviction violated federal law clearly established by several decisions of this Court, specifically, the due process right to be

convicted solely on the basis of evidence introduced at trial. At Mr. Owens's trial, the identity of the assailant was the sole disputed issue. The state produced no physical evidence linking Mr. Owens to the crime, but relied instead on two dubious and contradictory eyewitnesses to identify Mr. Owens as the assailant. In announcing the verdict, the trial court stated that "all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who Larry Owens knew was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder." As the state appellate court concluded unanimously, "there was no evidence presented that defendant knew Nelson was dealing drugs, and there was no evidence presented that defendant was involved with gangs or the illegal drug trade."

Petitioner does not dispute the fundamental due process right to be convicted solely based on evidence at trial, but contends that the court of appeals erred by framing the issue at too high a level of generality and because motive is not an element of murder under Illinois law. Neither of these points has merit. Clearly established precedent from this Court demonstrates that the due process right at issue is sufficiently specific that habeas relief may be granted where a trial court bases a finding of guilt on facts not in evidence. Further, decisions in this Court and the Illinois Supreme Court establish that motive is a key means of establishing whether a

particular person committed a crime where identity is at issue.

In a two-to-one decision, however, the state appellate court held the trial court's error harmless in a ruling contrary to clearly established federal law. The state appellate court merely set aside the trial court's error and assessed the remaining evidence without determining, as this Court's precedents require, whether the trial court would have convicted if it could not consider Mr. Owens's supposed knowledge of, and motive to kill, the victim. Further, the state appellate court conducted its harmless error analysis unreasonably by substituting its view of the credibility of the eyewitnesses for that of the trial court. Properly viewed under this Court's clearly established harmless error precedent, the trial court's error had a substantial and injurious effect and influence on the guilty verdict, causing Mr. Owens actual prejudice. For these reasons, the grant of the writ should be affirmed.

ARGUMENT

I. Clearly Established Supreme Court Precedent Prohibits A Criminal Conviction Based On Facts Not Presented At Trial.

The AEDPA empowers federal courts to grant habeas relief in cases where a state court's adjudication has "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.

§ 2254(d)(1); *see Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007); *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). "Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court." *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *see, e.g., Brewer v. Quarterman*, 550 U.S. 286, 289 (2007). First, Section 2254(d)(1) authorizes habeas relief where state court decisions are "contrary to" the Court's clearly established precedent when they "appl[y] a rule that contradicts the governing law set forth in [the Court's] cases," or "confront[] a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrive[] at a result different from [the Court's] precedent." *Williams v. Taylor*, 529 U.S. at 405-06.

Second, Section 2254(d)(1) also authorizes habeas relief from state court decisions that are an "unreasonable application of" the Court's clearly established precedent because they "correctly identif[y] the governing legal rule but appl[y] it unreasonably to the facts of a particular prisoner's case...." *Williams v. Taylor*, 529 U.S. at 407-08; *Porter v. McCollum*, 558 U.S. 30, 44 (2009) (per curiam).

This Court has held "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. Nor does AEDPA prohibit a federal court from finding an application of a principle

unreasonable when it involves a set of facts different from those of the case in which the principle was announced. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (citations and quotations omitted). "These principles guide a reviewing court that is faced ... with a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling." *Id.*; *see Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012).

A. The Court Of Appeals Correctly Identified Precedent From This Court That Clearly Established The Due Process Right Violated At Mr. Owens's Trial.

Petitioner's primary argument is that there is no "clearly established Federal law" governing Mr. Owens's claim. Pet. Br. 14-20. That argument is incorrect. This Court has established that criminal defendants have a fundamental due process right not to be convicted based on supposed facts for which there is no evidence in the record, whether in a jury trial or in a bench trial. The Seventh Circuit correctly identified *Holbrook*, 475 U.S. at 567; *Taylor*, 436 U.S. at 485; and *Estelle*, 425 U.S. at 503 as among this Court's cases recognizing that right. App. 2a, 10a.[5]

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[5] That the Seventh Circuit, after citing Supreme Court precedent, then referred to two of its own cases is irrelevant. *See* Pet. Br. 20-21. The Seventh Circuit correctly determined that *this Court's* precedent established that criminal

There is no debate that "[t]he right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle*, 425 U.S. at 503; U.S. Const. amend. XIV, § 1. Due process requires that a "verdict must be based upon the evidence developed at the trial." *Turner*, 379 U.S. at 472 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). "This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416." *Id.* (quoting *Irvin*, 366 U.S. at 722 (1961)); *see also Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences."). Petitioner does not contest that this is a bedrock principle of the criminal justice system. Nor could he, given this Court's precedents.

In *Estelle*, this Court identified the presumption of innocence as a "basic component of a fair trial" and stated that to implement this presumption, "courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence

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defendants have the right for their guilt or innocence to be adjudicated on the basis of evidence introduced at trial; the cites to its own cases were only further support for this point. *See* App. 2a. Moreover, the Seventh Circuit did *not* "canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct." *See Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (per curiam) (citing cases).

and beyond a reasonable doubt." 425 U.S. at 503. The Court held the Fourteenth Amendment prohibited the state from compelling a criminal defendant to wear identifiable prison clothing at a jury trial "because of the possible impairment of the presumption so basic to the adversary system." *Id.* at 504.

Although *Estelle* ultimately concluded that defendant's failure to object may have been tactical and the defendant therefore waived his claim, *id.* at 512-13, two years later the Court held that *Estelle* "quite clearly relates the concept of presumption of innocence to the cognate requirements *of finding guilt only on the basis of the evidence* and beyond a reasonable doubt." *Taylor*, 436 U.S. at 486 n.13 (emphasis added).

In *Taylor*, this Court held that the state trial court violated the Fourteenth Amendment by refusing to give a requested jury instruction on the presumption of innocence. *Id.* at 490. Citing *Estelle*, the Court stated unequivocally that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, *or other circumstances not adduced as proof at trial.*" *Taylor*, 436 U.S. at 485 (emphasis added). The Court specifically criticized the prosecution for "asking the jury to make inferences about petitioner's conduct from 'facts' not in evidence, but propounded by the prosecutor." *Id.* at 486. The Court thus reversed the state conviction in *Taylor* because the state trial

court had not instructed the jury adequately to counter the risk that jurors might violate "the accused's constitutional right to be judged solely on the basis of proof adduced at trial." *Id.*

Thirteen years before *Taylor*, in *Turner*, this Court reviewed a state conviction where the two deputy sheriffs who were placed in charge of the sequestered jury were prosecution witnesses at the trial. 379 U.S. at 468-69. Concerned about what the deputies might have said to the jurors outside the courtroom, this Court held that the constitution requires "at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." 379 U.S. at 472-73. Thus, the Court held that "the potentialities of what went on outside the courtroom during the three days of the trial may well have made these courtroom proceedings little more than a hollow formality." *Id.* at 473. Even though the deputies testified that they had not discussed the case with jurors, the Court deemed the risk that evidence developed against the defendant might not "come from the witness stand in a public courtroom" violated the constitution and required reversal of the state conviction. *Id.*

Petitioner's attempts to distinguish this Court's precedents fail. Pet. Br. 17-21. Petitioner cannot dispute that *Taylor* clearly establishes (or re-establishes) "the accused's constitutional right to be judged solely on the basis of proof adduced at trial."

436 U.S. at 486. As evidenced by its own words, the trial court in Mr. Owens's bench trial 22 years after *Taylor* relied expressly on facts not based on any evidence at trial. JA133; *see* App. 128a-129a. This reliance plainly violated Mr. Owens's clearly established due process right "to be judged solely on the basis of proof adduced at trial." *Taylor*, 436 U.S. at 486.[6]

Petitioner does not address this Court's holding in *Turner*. In violation of the holding in *Turner*, the fact-findings upon which the trial court expressly based Mr. Owens's guilty verdict did not "come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." 379 U.S. at 473. Because the state never provided any evidence of the supposed facts that led the trial court to convict, Mr. Owens never had a chance to confront or cross-examine on those facts. Mr. Owens had no chance to put on his own evidence to contradict the trial court's unsupported speculations. Mr. Owens's counsel could not address "the real issue" that led the trial court to convict him. *Cf. Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.").

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[6] In 1986, *Holbrook* expressly reaffirmed the due process right clearly established in *Estelle* and *Taylor*, 475 U.S. at 567-68, though it found that the presence of security guards in the courtroom there did not violate that right, *id.* at 572.

Petitioner seizes on the fact that Mr. Owens was tried by a judge rather than a jury. Pet. Br. 17 While Petitioner does not contend that this due process right applies only at jury trials, Petitioner invokes the presumption that judges "know and follow the law and [are] less susceptible to considering improperly admitted evidence than are juries." Pet. Br. 17 (citing *Williams v. Illinois*, 132 S. Ct. 2221, 2235 (2012) and *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (per curiam)). That may be true as a general proposition, but this is not a case about the impact of improperly admitted evidence on a trial court. This case involves a trial court making up facts out of whole cloth, as the state appellate court acknowledged. App. 119a. No presumption can immunize this due process violation.[7]

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[7] The actual holdings in Petitioner's cases, *Williams* and *Harris*, are irrelevant here. *Williams* holds that *Crawford v. Washington*, 541 U.S. 36, 50 (2004) does not "preclude[] an expert witness from testifying in a manner that has long been allowed under the law of evidence," *i.e.*, "from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify," *see Williams*, 132 S. Ct. at 2227. *Williams* also holds that *Crawford* does not "substantially impede[] the ability of prosecutors to introduce DNA evidence," *id.* The State had no expert witness at Mr. Owens's trial and no physical evidence at all, let alone DNA evidence.

Harris "h[e]ld that there is no federal requirement that a state trial judge explain his reasons for *acquitting* a defendant in a state criminal trial; even if the acquittal rests on an improper ground, that error would not create a constitutional defect in a guilty verdict [for co-defendants of the acquitted defendant] that is supported by sufficient evidence and is the product of a

Petitioner relies on the state appellate court's invocation of this presumption to justify ignoring the trial court's express explanation of its primary reason for finding Mr. Owens guilty. Pet. Br. 22 (citing App. 118a and *People v. Worlds*, 400 N.E.2d 85, 87-88 (Ill. App. Ct. 1980)). Ironically, the *Worlds* decision, on which the state appellate court and Petitioner rely, *rejects* the application of this presumption and *reverses* a conviction where – as here – the record clearly establishes through the trial court's own statements that the court relied in part on improper evidence (or non-evidence, as here): "It would verge upon the ridiculous for us to say that the trial court paid no attention to information which he himself expressly elicited. We regard this type of situation as comparable to one in which the trial court engages in a private investigation." *Id.* (citations omitted). At least as troubling to the fact-finding function as the trial court that engages in a private investigation is the trial court that simply makes up facts on which to base its guilty verdict.[8]

Petitioner's reliance on this Court's decision in *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) as a federal basis for applying this

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fair trial." 454 U.S. at 344 (emphasis added). Here, however, it is a *guilty verdict*, not an acquittal, that rests upon an improper ground, *i.e.*, facts unsupported by any evidence at trial.

[8] The dissent in Mr. Owens's case takes the majority to task for applying this presumption in this case: "In the instant case that presumption has been clearly and undeniably rebutted. Even the majority cannot deny that the trial court considered matters outside the trial record." App. 128a.

presumption here also is misplaced. Pet. Br. 22-23. Nothing in *Visciotti* suggests that "the presumption that state courts know and follow the law," 537 U.S. at 24, is irrefutable even in the face of express statements by a trial court on the record demonstrating the opposite. No presumption anywhere in federal or Illinois law protects a trial court's findings based on no evidence at all.

Nor does Petitioner's attempt to distinguish this Court's precedents based on the state's role in the trial court's error withstand analysis. Pet. Br. 17. The fact that "the State in this case did not invite the trial court to infer [Mr. Owens's] guilt from any improper basis, as the prosecution did in *Taylor*," Pet. Br. 17, cannot matter when the trial court *sua sponte* found Mr. Owens guilty based on facts not in evidence. In sum, it cannot be disputed that there is clearly established federal law that entitled Mr. Owens to be tried and convicted based only on the evidence introduced at trial.

B. Nearly Identical Facts Are Not Necessary To Show Clearly Established Federal Law.

Given the undisputed "constitutional right to be judged solely on the basis of proof adduced at trial," *Taylor*, 436 U.S. at 486, and the indisputable fact that the trial court based its guilty verdict on facts with no evidentiary basis, App. 119a, Petitioner argues that habeas relief must be denied because none of the foregoing cases specifically apply this fundamental right to a trial court's unsupported fact-findings. Pet. Br. 15-20. But showing clearly established federal law does not require showing

that this Court has previously addressed a case with nearly identical facts. Petitioner cites *Marshall v. Rodgers*, 133 S. Ct. 1446, 1449 (2013) (per curiam) for this proposition. *See* Pet. Br. 14-15. But *Marshall* is inapposite. In *Marshall*, the Court denied habeas relief not because the facts differed from earlier cases, but because the supposed underlying right was not clearly established. The defendant in *Marshall* repeatedly changed his mind about whether to proceed *pro se* at trial; the third time he changed his mind and requested appointed counsel, his request was denied. *Id.* at 1448. The Court denied habeas relief because it had never clearly established the right of a criminal defendant to "re-assert his right to counsel once he has validly waived it." *Id.* at 1449 (quotation omitted). Significantly, however, the Court went on to explain "that the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since a 'general standard' from this Court's cases can supply such law." *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)); *see also Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment in part and dissenting in part) ("AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.").

To hold otherwise would transform habeas corpus analysis from what should be a legal inquiry as to the existence of clearly established federal law into a search for cases with surface-level factual

similarities. Petitioner's rationale would leave federal courts powerless to grant habeas relief in cases where a violation of a constitutional "general standard from this Court's cases," *Marshall*, 133 S. Ct. at 1449 (quotation omitted), is flagrant, but a case with nearly identical facts has not yet reached this Court.

For this very reason, Section 2254(d)(1) does not require that this Court have previously addressed specifically the content of findings made by a trial court in pronouncing a verdict in a criminal bench trial for this Court to determine that Mr. Owens's conviction violates the clearly established constitutional rule that criminal defendants should be convicted *only* on the basis of evidence introduced at trial. This rule is clear and specific. Consequently, "the range of reasonable judgment" under this rule is "narrow. Applications of the rule may be plainly correct or incorrect." *Yarborough*, 541 U.S. at 663-64. It would be difficult to conjure a clearer, more unreasonable violation of this rule than a trial court explaining that its reason for finding a defendant guilty rests on facts supported nowhere in the trial record.

Indeed, this Court applies general rules of a fundamental nature to grant habeas relief when "faced, as we are here, with a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling." *Panetti*, 551 U.S. at 953; *accord Musladin*, 549 U.S. at 80-81 (Kennedy, J., concurring in judgment in part and dissenting in part).

For example, *Lafler*, 132 S. Ct. 1376, demonstrates that this Court does not require nearly identical facts for a principle of law to be clearly established under § 2254(d). Before *Lafler*, this Court had held that the standard for ineffective assistance of counsel of *Strickland v. Washington*, 466 U.S. 668 (1984), applied to a defendant's claim that, but for defense counsel's erroneous advice regarding parole eligibility, defendant would have rejected a plea offer. *Hill v. Lockhart*, 474 U.S. 52, 58-60 (1985). But as this Court explicitly acknowledged, in *Lafler* the facts were reversed: The defendant claimed that but for the alleged ineffective assistance of counsel, defendant would have *accepted* a plea offer. "In contrast to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection." *Lafler*, 132 S. Ct. at 1385. Unlike *Hill*, the *Lafler* defendant was sentenced after conviction at "a full and fair trial before a jury." *Id.* at 1383. "Having to stand trial, not choosing to waive it, is the prejudice alleged." *Id.* at 1385. The Court held that these factual differences between *Lafler* and prior precedent did not preclude the *Lafler* defendant from satisfying AEDPA § 2254(d)(1): "By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law." *Id.* at 1390.

Similarly, *Panetti* held that the broad Eighth Amendment prohibition against executing a prisoner who is insane announced in *Ford v. Wainwright*, 477 U.S. 399 (1986), was clearly established federal law

under Section 2254(d)(1). *Panetti*, 551 U.S. at 948. Neither the fact that *Ford* did not establish specific due process requirements concerning the processes for establishing insanity nor the fact that the Texas procedures in *Panetti* varied widely from the Florida procedures in *Ford*, giving the two cases very different factual backgrounds, prohibited the federal courts from concluding that Texas had applied *Ford* unreasonably. *Id.* at 953-54.

The due process rule Mr. Owens invokes here is specific and this Court has applied it in different procedural settings over the years, as Section I.A. above demonstrates. There can be no doubt clearly established federal law prohibits trial courts from finding defendants guilty based on unsupported facts. Therefore, Petitioner is incorrect to insist that the absence of a case with nearly identical facts bars Mr. Owens from relief under § 2254(d).

Petitioner unsuccessfully attempts to portray the court of appeals decision as "fail[ing] to heed this Court's repeated warning that the lower courts should not 'frame[] the issue at too high a level of generality' in discussing whether a principle is clearly established enough to support habeas relief." Pet. Br. 18 (quoting *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (per curiam)). As with *Marshall*, Petitioner's other per curiam decisions generally involve facts that simply do not qualify as constitutional violations; not a single case denies habeas relief with a fact scenario that squarely violates a constitutional right. Thus, Petitioner's cases are not relevant to this case, where the trial

court convicted Mr. Owens based upon supposed facts entirely absent from the record of his trial in violation of the clearly established fundamental due process right to be judged solely on the basis of evidence in the record.

For example, in *Woods*, 135 S. Ct. at 1375-78, the Court merely held that petitioner's counsel's ten-minute absence from the courtroom while the trial focused exclusively on evidence that related only to co-defendants and not to petitioner did not support a habeas claim of denial of counsel at a "critical stage of his trial," 135 S. Ct. at 1375 (quotation omitted), or a presumption of constitutional prejudice under *United States v. Cronic*, 466 U.S. 648 (1984).

In *Nevada v. Jackson*, 133 S. Ct. 1990, 1993 (2013) (per curiam), the Court held that *Michigan v. Lucas*, 500 U.S. 145 (1991) did not clearly establish a constitutional right to habeas relief for a rape defendant who failed to comply with a state statute requiring prior notice of intent to cross-examine a complaining witness about supposedly fabricated previous sexual assault accusations, particularly where "the proffered evidence had little impeachment value because at most it showed simply that the victim's reports could not be corroborated." 133 S. Ct. at 1993.

Similarly, in *Lopez v. Smith*, 135 S. Ct. 1, 2-4 (2014) (per curiam) the defendant, who was charged with murder and whose DNA was found on the murder weapon and on duct tape and a burned matchstick that may have been used in the murder, complained that the prosecution had not provided

adequate advance notice that it would seek an aiding–and–abetting jury instruction along with instructions on other theories of liability for the charged murder. Because no cases of this Court had even come close to requiring notice of alternate theories of liability for a charged offense, the defendant in *Lopez* cited only to general cases concerning the right of defendants to know the charges against them and the Ninth Circuit issued habeas relief because "it found the instant case to be 'indistinguishable from' the Ninth Circuit's own decision" in a prior case. *Id.* at 3 (quotation omitted).

Petitioner's reliance on *Musladin*, Pet. Br. 18-20, is also misplaced: In *Musladin*, this Court addressed the question of whether the holdings of *Estelle* and *Holbrook v. Flynn* clearly established federal law concerning the conduct of spectators at a trial. The Court held there was no "clearly established Federal law" that required applying the relevant tests to spectators' conduct rather than to the conduct of the state at trial: "In contrast to state-sponsored courtroom practices [as in *Estelle* and *Flynn*], the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence." 549 U.S. at 76-77 The distinction between state conduct and private-actor courtroom conduct has no relevance here. The trial court's conduct in deciding Mr. Owens's trial was unquestionably state conduct. As to *state* conduct, the *Musladin* Court did not question that *Estelle* and *Flynn* provide clearly established law. *Id.* at 75-77 *Musladin* never

mentions *Taylor v. Kentucky* or its clear establishment of "the accused's constitutional right to be judged solely on the basis of proof adduced at trial." *Compare Taylor*, 436 U.S. at 484-90 *with Musladin*, 549 U.S. at 75-77

This Court's precedents establish conclusively that there is clearly established federal law that a criminal defendant has a constitutional right to be judged solely on the basis of proof adduced at trial. In Mr. Owens's case, the trial court violated that right by explicitly basing its guilty verdict on fact-findings of knowledge and motive that absolutely no evidence at trial supported. Consequently, the grant of habeas relief to Mr. Owens should be affirmed.[9]

C. Petitioner Cannot Deny The Constitutional Violation By Arguing That Motive Is Not An Element Of The Offense.

Petitioner's effort to minimize the significance of the trial court's wholly unsupported findings by characterizing them as pertaining only to motive and therefore as "not an element of the crime" rings hollow. Pet. Br. 22. Although motive is not a separate element of the offense of murder in Illinois, it is a means of proving *who* committed the murder,

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[9] Petitioner's *amici* contend that any inquiry into the reasoning of the fact-finder is precluded, but *amici* cite cases that relate specifically to inconsistent verdicts. *Amici* Br. 11-12 (citing *United States v. Powell*, 469 U.S. 57, 65 (1984) and *Harris v. Rivera*, 454 U.S. at 348). Nothing in either case requires courts to ignore the constitutional violation of clearly established federal law in this case.

which most certainly is an element the state had to prove to convict Mr. Owens here – indeed *the* element at issue in the trial. The state said so at closing: "Judge, it boils down to identification." JA110. But, the eyewitness identification testimony of Mr. Johnnie and Mr. Evans only persuaded the trial court that they had "skirted the real issue." JA133. Rather than crediting their identification testimony, the trial court specified that the "real issue" was Mr. Owens's supposed motive: "The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off." JA133.

This Court has addressed the importance of motive evidence before in cases of identification. In *House v. Bell*, 547 U.S. 518 (2006), the Court addressed a request for habeas relief from a state murder conviction where the state adduced DNA evidence at trial suggesting that the defendant had had sexual contact with the victim shortly before the murder. At the habeas proceedings that DNA evidence proved false and the state, as it did here, argued that neither the sexual conduct nor the motive established at trial through the bad DNA evidence were elements of the offense. *Id.* at 540. This Court disagreed: "From beginning to end the case is about who committed the crime. *When identity is in question, motive is key.*" *Id.* (emphasis added). The Court reversed the lower court's refusal to hear procedurally defaulted claims and remanded to allow the defendant to pursue the "actual

innocence" exception to procedural default. *Id.* at 553-55.

Petitioner relies on Illinois law for his argument about motive. Pet. Br. 15-16. But the Illinois Supreme Court has agreed with this Court about the significance of motive. In *People v. Smith*, 565 N.E.2d 900 (Ill. 1990), the state had obtained a conviction using gang involvement as a motive. Acknowledging "that motive is not an essential element of the crime of murder," the Illinois Supreme Court stated: "It is also well established, however, that any evidence which tends to show that an accused had a motive for killing the deceased is relevant because it renders more probable that the accused did kill the deceased." *Id.* at 906 (citing cases). Therefore, "when the State undertakes to prove facts which the State asserts constitute a motive for the crime charged, *it must be shown that the accused knew of those facts.*" *Id.* (emphasis added) (citing cases). Yet Mr. Owens's supposed knowledge that Mr. Nelson was a drug dealer and wanted to kill him because he was a drug dealer was a key fact the trial court simply made up. App. 119a. Far from supporting Petitioner's position, the Illinois Supreme Court reversed the conviction in *Smith*. 565 N.E.2d at 917.

Petitioner argues that the trial court's statement that "I think the State's evidence has proved that fact," JA133, somehow immunizes the verdict here. Pet. Br. 22. This argument has no basis in law, logic, or fact. A fact-finder cannot create a safe harbor for erroneous reliance on facts not in evidence by simply

stating, contrary to the record, that such facts *were* in evidence. The state's evidence did *not* prove that Mr. Owens "knew" Mr. Nelson was a drug dealer, or knew him at all. The state's evidence did *not* prove that Mr. Owens "wanted to knock him off." The circularity of Petitioner's argument -- that the trial court's verdict was based on record evidence if the fact-finder says it was -- is contrary to the fundamental constitutional guarantee that one cannot be deprived of life or liberty based on speculation or conjecture. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *Taylor*, 436 U.S. at 484-86.

As *House* and *Smith* establish, motive relates directly to the element of proving who committed the crime. Under the clearly established caselaw of this Court, Mr. Owens had a due process right to have his supposed motive, and thus his guilt, "judged solely on the basis of proof adduced at trial." *Taylor*, 436 U.S. at 486. Because that did not happen here – because the trial court found that Mr. Owens had the knowledge required to prove motive without any evidence to support that finding – the issuance of the writ should be affirmed.

II. The Violation Of Mr. Owens's Due Process Right Was Not Harmless Error.

The trial court's violation of clearly established federal law was not harmless error. The error clearly inflicted actual prejudice on Mr. Owens; it had a "'substantial and injurious effect or influence in determining'" his guilty verdict. *Brecht*, 507 U.S. at 637-38 (quoting *Kotteakos v. United States*, 328

U.S. 750, 776 (1946)); *see also Ayala*, 135 S. Ct. 2187; *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007).

Nor can the state appellate court's two-to-one ruling that the trial court's error was harmless whitewash the actual prejudice Mr. Owens suffered from the violation of his clearly established rights. The appellate court's harmless error ruling was unreasonable for two reasons. First, it is contrary to this Court's clearly established precedents governing determining whether error is harmless in habeas review because the state appellate court engaged in the simple subtraction analysis deemed improper in *Brecht* and *Kotteakos*.

Second, the state appellate court's unreasonable approach to harmless error review had the effect of improperly supplanting the trial court as arbiter of witness credibility and primary fact-finder. Petitioner concedes as much by arguing that "[t]he Seventh Circuit ... wrongly rejected the Illinois Appellate Court's reasonable *findings of fact*." Pet. Br. 21 (emphasis added). The state appellate court had no business making findings of fact and its findings are unreasonably based upon speculation, in violation of *Sullivan*, 508 U.S. at 281, and are actually prejudicial to Mr. Owens.

A "harmlessness determination itself must be 'unreasonable' for habeas relief to issue, and the determination 'is not unreasonable if 'fairminded jurists could disagree' on its correctness." *Ayala*, 135 S. Ct. at 2199 (*quoting Harrington v. Richter*, 562 U.S. 86, 101 (2011)); *see also* Pet. Br. 24; *Amici* Br. 17-19. This standard is very deferential, but it is

surmountable here. Recently, the Court set forth the analogous standard for Section 2254(d)(2) in *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) ("If [r]easonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's ... determination") (quotation omitted). Nevertheless, the Court stated: "As we have also observed, however, [e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review, and does not by definition preclude relief." *Id.* (quotation and citations omitted). The appellate court's harmlessness determination here violates clearly established precedent from this Court and is unreasonable. Relief is warranted here.

A. The State Appellate Court's Ruling Of Harmless Error Violated This Court's Clearly Established Law And Resulted In Actual Prejudice.

A review of the state appellate court's order reveals why its harmless error analysis is unreasonable and fails the *Brecht* test. In a two-to-one decision, that court held that the trial court's error was harmless because "defendant's conviction rests upon the eyewitness testimony of Johnnie and Evans, each of whom separately identified defendant as Nelson's assailant." App. 119a. But the appellate court conceded: "It is true that Johnnie and Evans contradict each other on some points regarding the event, and the reliability of Evans' testimony is severely called into question." App. 119a (footnotes

omitted). Ultimately, the appellate court deemed the error harmless because "Johnnie's identification testimony is reliable and sufficient enough to support the trial court's guilty verdict." App. 119a-120a. Petitioner likewise relies on Mr. Johnnie's testimony to support the argument that the constitutional error was harmless. Pet. Br. 25-26.

Petitioner misunderstands the Court's precedents clearly establishing the legal standard for determining whether a constitutional error was harmless under Section 2254. The Court has repeatedly applied the "substantial and injurious" standard adopted in *Brecht*, 507 U.S. at 637-38, from *Kotteakos*, 328 U.S. at 776 when conducting habeas review of state criminal convictions.

Contrary to the state appellate court's approach and Petitioner's argument, this Court's clearly established precedents demonstrate that the "substantial and injurious" standard is not merely a subtraction exercise. "This [review of error] must take account of what the error meant to [the fact-finder], not singled out and standing alone, but in relation to all else that happened." *Kotteakos*, 328 U.S. at 764. The Court explained, "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 765. As the Court stated in *O'Neal v. McAninch*, 513 U.S. 432 (1995), *Brecht* held "that the *Kotteakos*

standard applied in its *entirety*." *Id.* at 439 (Court's emphasis).[10]

The state appellate court, however, conducted "[t]he inquiry [that] cannot be" under *Kotteakos*, 328 U.S. at 765: It merely set aside the trial court's acknowledged error and looked to the remainder of the record for its harmlessness determination. As the appellate court acknowledged, there is no dispute that the trial court explicitly considered facts that were not part of the record in rendering its verdict. App. 119a. The trial court expressly stated that it convicted Mr. Owens based on Mr. Owens's supposed knowledge that Mr. Nelson was a drug dealer and Mr. Owens's supposed desire to "knock him off" because he dealt drugs. JA133. As the appellate court acknowledged, those facts were not in evidence: "there was no evidence presented that defendant knew Nelson was dealing drugs, and there was no evidence presented that defendant was involved with gangs or the illegal drug trade." App. 119a.

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[10] *O'Neal* also clarified "the legal rule that governs the special circumstance in which record review leaves the conscientious judge in grave doubt about the likely effect of an error on the jury's verdict." *Id.* at 435. Explaining that "grave doubt" means "that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error," the Court concluded "that the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.*, as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')." *Id.* That principle need not be invoked here because there should be no doubt that the error here had a substantial and injurious effect on the guilty verdict.

To get around the trial court's actual stated reason for finding Mr. Owens guilty, the appellate court simply looked to other evidence to shore up the undermined conviction: "Johnnie's identification testimony is reliable and sufficient enough to support the trial court's guilty verdict." App. 119a-120a. It also stated that "despite the contradictions between their testimony," Mr. Evans, whose reliability, the court admitted, "is severely called into question," corroborated Johnnie. App. 119a-120a. "Therefore," the appellate court concluded, "in light of these identifications, the trial court's speculation as to defendant's motive for assaulting Nelson, will be construed as harmless error." App. 120a.

The trial court never said it believed either witness. The state appellate court admitted that fact: "Here, there is no indication whether or not the trial court assessed the credibility of the eyewitnesses, resolved conflicts in their testimony, or weighed the evidence or drew reasonable inferences therefrom." App. 118a. In fact, the trial court expressly found the witnesses' testimony insufficient, stating that "all of the witnesses skirted the real issue." JA133. As the dissent concluded, "the record affirmatively demonstrates that the court reached its verdict *solely* based upon defendant's purported motive." App. 128a (emphasis added).

The state appellate court's analysis thus is one of pure subtraction, dropping what the trial court said it found *without analyzing what the trial court would have ruled absent the motive the trial court found outcome-determinative.* This was an erroneous and

unreasonable means to determine harmless error. The state appellate court did *not*, as this Court's clearly established caselaw requires, assess "what effect [this error] had upon the guilty verdict in the case at hand," *Sullivan*, 508 U.S. at 279 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967); it did *not* "declare a belief that [the error] was harmless beyond a reasonable doubt," *Chapman,* 386 U.S. at 24; and it did *not* address "the impact of the thing done wrong on the mind[] of [the trial court], not on [the appellate court's] own, in the total setting," *Kotteakos*, 328 U.S. at 764.

The *only* manner in which the appellate court addressed the trial court's clear rejection of the eyewitnesses' testimony here was to try to erase that rejection by invoking a presumption that "despite the trial judge's comments ... the trial judge considered only competent evidence in reaching his verdict." App. 118a. As noted above, however, the appellate court got that backwards: The trial court's comments rebutted the presumption. As the dissent stated: "In the instant case that presumption has been clearly and undeniably rebutted." App. 128a.

Thus, the state appellate court's harmless error analysis violated the applicable clearly established federal legal standard for determining harmless error set forth in this Court's decisions. It was both unreasonable and actually prejudicial.

B. The State Appellate Court's Ruling Of Harmless Error Was Also Unreasonable Because It Depended On That Court's Assessment Of The Credibility Of Witnesses It Never Saw, Whom The Trial Court Did Not Credit.

Furthermore, the state appellate court's assessment of the evidence that the state actually introduced is unreasonable because that assessment hinges completely on assessing the credibility of eyewitnesses that court never saw.[11] Significantly, the state appellate court here was *not* in a position to uphold a decision by the trial court to believe these key witnesses or credit their identifications. The trial court found "all of the witnesses" had "skirted the real issue." JA133. Rather than crediting their identification testimony, the trial court invented motive evidence to tie Mr. Owens to the attack on Mr. Nelson. JA133. This is not a ringing endorsement of the witnesses' credibility by the trial court which actually observed their demeanor and heard their testimony firsthand.

If the trial court had believed the eyewitness identification testimony, it would not have had to turn to motive to find guilt. But the trial court did

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[11] The state appellate court recognized that "of all the factors that account for the conviction of the innocent, the fallibility of eyewitness identification ranks at the top, far above all the others." App. 117a (quotation omitted). The state appellate court thus shared with the Seventh Circuit "the substantial doubts that have been raised concerning the reliability of eyewitness evidence." App. 4a (listing scholarly studies).

not say anything resembling 'I believe Mr. Johnnie.' The trial court said Mr. Johnnie and the other witnesses "skirted the real issue" and then ruled:

> The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.

JA133. By finding as facts Mr. Owens's supposed knowledge and motive, which the state never even tried to prove, and convicting based on those unsupported facts, the trial court relieved the state of its burden of proving beyond a reasonable doubt that Mr. Owens killed Mr. Nelson, much like the erroneous "reasonable doubt" instruction in *Sullivan*. In this case, as in *Sullivan*, that meant that a state appellate court became the first court to apply the reasonable doubt standard to the actual evidence in the record, a role it is not equipped to handle: "A reviewing court can only engage in pure speculation – its view of what a reasonable [fact-finder] would have done. And when it does that, the wrong entity judges the defendant guilty." *Sullivan*, 508 U.S. at 281 (quotation and citation omitted).

In performing its analysis, the state appellate court relied on *Neil v. Biggers*, 409 U.S. 188 (1972), App. 117a, 120a, but that decision's test was not designed to allow an appellate court to evaluate the credibility of witnesses itself in the first instance and it was not designed as a substitute for harmless error analysis. *Biggers* addresses the admissibility of

evidence of a suggestive confrontation procedure, but does not authorize an appellate court to credit a witness's identification where the trial court who observed the witness's testimony did not. 409 U.S. at 198-201.[12] Moreover, as the analysis below reveals, the appellate court ignored many problems with Mr. Johnnie's testimony, invalidating this analysis.[13]

Significantly, the appellate court admonished the trial court "that in a case such as this, where there is no physical evidence linking defendant to the crime and the identity of the perpetrator of the charged

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[12] Furthermore, Mr. Johnnie's identification does not compare favorably with the identification made by the rape victim in *Biggers*. She "spent a considerable period of time with her assailant, up to half an hour." 409 U.S. at 200. Mr. Johnnie saw Mr. Nelson's assailant "under very stressful circumstances within a brief time span." App. 128a (South, J. dissenting). The description given by the victim in *Biggers* "included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice...." 409 U.S. at 200-01. Mr. Johnnie's description included only approximate height and weight. JA37.

[13] The state attempts to support the appellate court's harmless error analysis with Officer Alexander's testimony that Mr. Owens sought to elude him. Pet. Br. 27. The appellate court did not mention that testimony in its harmless error analysis, App. 118a-122a, just as the trial court never mentioned it, JA133, and with good reason. Fleeing a traffic stop could be the result of countless causes short of murder. Indeed one concerned about being arrested for murder is not likely to travel fifty miles per hour in a twenty mile per hour zone in the area near the attack. *See* App. 100a. A month after the attack on Mr. Nelson, this fact cannot possibly make the trial judge's unsupported guilty verdict harmless error.

crime is at issue and defendant's conviction rests upon eyewitness testimony – every effort should be made to assess the credibility of the eyewitnesses, resolve any conflicts in their testimony, weigh the evidence and draw reasonable inferences therefrom." App. 120a. But the appellate court did not remand to the trial court for that purpose. Instead, it tried to do all those things itself with respect to witnesses it had never seen. That contradicts this Court's admonishment about such an effort in *Sullivan*: "A reviewing court can only engage in pure speculation.... And when it does that, the wrong entity judges the defendant guilty." 508 U.S. at 281 (quotation and citation omitted).

Certainly, the trial court had many good reasons in the trial record *not* to credit these eyewitnesses, only a few of which the appellate court acknowledged, and none of which that court weighed fully. The appellate court noted "that Johnnie and Evans contradict each other on some points regarding the event...." App. 119a. Specifically, the appellate court said:

> Evans testified that two men approached Nelson, one of whom beat Nelson with a bat and afterwards both men ran away from the scene. Johnnie testified, however, that Nelson was approached by only one individual who beat him, and afterwards this individual walked away from the scene.

App. 119a n.2. But the conflicts between Mr. Evans and Mr. Johnnie were greater than the appellate court portrayed them: Mr. Evans claimed that he

saw Mr. Nelson have a conversation with his two assailants before the attack, JA79; but Mr. Johnnie saw no conversation, saying that the lone assailant strode up and hit Mr. Nelson immediately with the bat, JA22-24. Furthermore, cross-examination revealed that Mr. Evans testified before the grand jury that the two assailants encountered Mr. Nelson after they exited from Mackie's, JA102, another conflict with Mr. Johnnie's testimony.

The appellate court also noted that "the reliability of Evans' testimony is severely called into question." App. 119a. It explained:

> Evans' testimony was weakened by the fact that at trial he twice misidentified defendant's photograph in the photo-array, even though he testified that he recognized defendant from the neighborhood. Moreover, Evans' testimony was further weakened by the fact that during the trial he was in custody, and in exchange for his trial testimony the State agreed to recommend a sentence of probation on a pending drug charge and to recommend a recommitment of probation on an old drug charge.

App. 119a n.3. Again, the appellate court understated the problems with Mr. Evans's credibility. With respect to Mr. Evans's two drug charges, although the appellate court did not specify, they were not simple possession charges. One was for "possession of a controlled substance with intent to deliver" and the other for actual "delivery of [a] controlled substance," JA75.

With respect to the trial testimony about the photo-array, it is not clear that Mr. Evans "misidentified defendant's photograph in the photo-array," as the appellate court suggests. App. 119a. n.3. The state asked Mr. Evans which photo he selected at the array and he *twice identified the photograph of a different person.* JA86. It is thus also possible that Mr. Evans identified a different person at the photo-array, which would have contradicted Sergeant White's testimony, JA68-69 (this is how Mr. Owens's attorney understood this testimony, JA118).[14]

Additionally, the trial record shows that the trial court had good reason to doubt the accuracy of Mr. Johnnie's testimony, quite apart from the conflicting testimony from Mr. Evans. First, there is no dispute that Mr. Johnnie's testimony on the vital topic of his initial photo identification also contradicted the testimony of Sergeant White. Mr. Johnnie testified he had reviewed a whole *book* of photographs to identify Mr. Owens. JA44. In contrast, Sergeant White testified that Mr. Johnnie viewed a photo-array of six pictures. JA59. Furthermore, Mr. Owens was the only person in both the photo-array and the line-up for both witnesses, and Mr. Johnnie

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[14] Lack of certainty in the photo-array identification could explain why the state never obtained a warrant for Mr. Owens's arrest. *See* App. 100a.

admitted remembering at the line-up that the only person in both was Mr. Owens. JA45.[15]

As far as his ability to observe is concerned, Mr. Johnnie admitted he did not see the bat in the assailant's hands as the assailant approached Mr. Nelson: "At that time I did not see anything in his hands." JA23. Mr. Johnnie was paying the assailant little heed until the attack occurred. During the attack, the assailant's back was to the car and to Mr. Johnnie – Mr. Johnnie acknowledged that fact by saying he had the best chance to see the assailant as he turned to leave. JA52. Mr. Johnnie said the assailant "walked away," JA52, but Mr. Evans testified, "they took off running," JA84. Moreover, although Mr. Johnnie testified that his car was parked right in front of the door at Mackie's, JA17-18, Mr. Evans testified that he never saw Mr. Johnnie's car until they were putting Mr. Nelson into it after the attack, JA94; *see* also, JA79. The state impeached Mr. Evans with his grand jury testimony that Mr. Nelson left him and "went to talk to some guys in the car." JA103.

Additionally, Mr. Johnnie's actions after the attack, as established in the record, *i.e.*, refusing to enter the hospital, avoiding the police back at

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[15] Recognizing that allowing the investigating officer to conduct identification procedures is fraught with risk, Illinois has since enacted a law to enhance identification reliability that calls for, *inter alia*, an independent lineup administrator "who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspected perpetrator." *See* 725 ILCS 5/107A-0.1, 5/107A-2 (2015).

Mackie's, not contacting the police at all until they tracked him down, JA36-37, 49-51, 53-54, coupled with his efforts at trial to testify falsely that he participated in Mr. Morgan's conversations with the police, exposed on cross-examination, JA36-37, 54, may have caused the trial court to question Mr. Johnnie's credibility. Even unusual facts, like the fact that Mr. Johnnie was not driving his own car and the fact that Mr. Johnnie did not know the third person in his car, JA17, might have weighed into the trial court's credibility assessment.

The trial record thus contains much evidence from which the trial court could have decided not to believe the witnesses. JA133. Assessing isolated pieces of evidence (under *Biggers,* instead of determining whether the error was harmless beyond a reasonable doubt under *Chapman*), the state appellate court unreasonably engaged in pure speculation concerning the credibility of eyewitnesses it did not observe, and whose identification evidence the trial court eschewed in favor of a motive-based finding of guilt. For this reason too, the appellate court's harmlessness test is unreasonable and fails the *Brecht* test: It fails to show that the trial court's invented motive evidence did not have a "substantial and injurious effect or influence" on Mr. Owens's guilty verdict. *Brecht*, 507 U.S. at 623 (quotation and citation omitted).

C. Petitioner's Citation To Section 2254(e)(1) Cannot Save The State Appellate Court's Ruling.

Petitioner did not raise 28 U.S.C. § 2254 (e)(1) in his petition for certiorari or in the court of appeals. This Court deems issues not raised in a petition for certiorari waived. Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); Sup. Ct. R. 24.1(a) ("[T]he brief may not raise additional questions or change the substance of the questions already presented in [the petition for certiorari or jurisdictional statement]."); *see also Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992). Moreover, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). "These principles help to maintain the integrity of the process of certiorari." *Freeland & Kronz*, 503 U.S. at 646. Therefore this Court should not address Section 2254(e)(1).

Even if not waived, Petitioner's argument that Section 2254(e)(1)'s presumption of correctness applies to the state appellate court's harmlessness determination, Pet. Br. 26, lacks merit. It conflates distinct AEDPA standards of review that apply in distinct contexts. A state appellate court's conclusion that constitutional error was harmless is a conclusion of law reviewed under the requirements of Section 2254(d)(1) and *Brecht*. *See Ayala*, 135 S. Ct. at 2198-99 (explaining that Section 2254(d)(1)

applies to state court harmless error determinations). "The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions." *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003).

Petitioner argues that the appellate court's legal conclusion of harmless error is entitled to a presumption of correctness under Section 2254(e)(1) because the court "analyzed" and "noted" facts in the trial record in its legal analysis. Pet. Br. 25. This understanding of Section 2254(e)(1) is incorrect. Section 2254(d)(1) applies to legal conclusions, Section 2254(d)(2) applies to overall factual "decision[s]," and Section 2254(e)(1) supplies a burden of proof for rebutting a state court's "determination of a factual issue." 28 U.S.C. § 2254(d), (e). Section 2254(e)(1)'s presumption of correctness is relevant to federal postconviction review of predicate factual "determination[s]" of a state court, not to the state court's legal conclusions or its ultimate factual "decision." While this Court has declined to specify the exact parameters of § 2254(e)(1) in relation to § 2254(d), this Court has explained that Sections 2254(d) and (e) operate independently and should not be conflated: "AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence." *Cockrell*, 537 U.S. at 341. Petitioner cites no cases for its argument that Section 2254(e)(1) should apply here, and Section 2254(e)(1) is

inapposite and irrelevant to this Court's review of the appellate court's harmless error analysis.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court of appeals to issue the writ of habeas corpus. Alternatively, this Court should remand for reconsideration of the *Brecht* harmless error analysis in light of this Court's intervening decision in *Davis v. Ayala*, 135 S. Ct. 2187 (2015).

Respectfully submitted,

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STEPHEN DUNCAN, Warden,

PETITIONER,

v.

LAWRENCE OWENS,

RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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ARGUMENT

Respondent is unable to show that the Illinois Appellate Court's affirmance of his conviction was "contrary to, or an unreasonable application of, clearly established" precedent of this Court, as required by 28 U.S.C. § 2254(d)(1) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Respondent nonetheless asks this Court to reject that holding. But he barely addresses the reasonableness of the Illinois Appellate Court's conclusion that his rights were not violated, a conclusion that relied on the presumption that the trial judge "considered only competent evidence in reaching his verdict," App. 118a. Instead, he insists on a reading of the trial judge's comments that is not only improbable, but is impermissible under AEDPA. Respondent also reads this Court's precedent at an inappropriately high level of generality, and he relies on cases with factual circumstances vastly different from this case.

Respondent's arguments about harmless error likewise fail, most significantly because he ignores the requirement under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), that he suffer actual prejudice from the alleged error. Respondent also would have this Court violate the requirement that "a determination of a factual issue made by a state court shall be presumed to be correct," 28 U.S.C. § 2254(e)(1). For all these reasons, Respondent's arguments fail, and he is not entitled to habeas relief.

I. Respondent's Claims Rest On An Impermissible and Improbable Reading Of The Record.

Respondent's arguments all rest on the single, indefensible premise that the trial judge's comments

have only one possible reading: "I am not satisfied that the People have proven Respondent's guilt beyond a reasonable doubt with the evidence they have presented because the witnesses did not provide testimony about motive, which is the real issue. So I am going to conclude, even though the People did not provide any evidence of it, that Respondent knew Nelson was dealing drugs. Thus, I find that Respondent had a reason to kill Nelson. I therefore find him guilty." But this reading is impermissible under AEDPA.

What the judge actually said was: "I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who [Respondent] knew he was a drug dealer. [Respondent] wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder." JA133.

Respondent insists on reading these remarks in the worst possible light, taking every possible inference against the State, rejecting the presumption that judges know and follow the law, and rejecting the Illinois Appellate Court's holdings both that the presumption applied, see App. 118a, and that contrary to Respondent's claim, Resp.Br. 3, 15, no error occurred at all. None of this is permitted on habeas review. 28 U.S.C. §§ 2254(d)(1), 2254(e)(1); see also *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) ("When reviewing state criminal convictions [under AEDPA], federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong."); *Williams v. Illinois*, 132 S. Ct. 2221, 2235 (2012) (plurality opinion) (noting and relying on presumption, under both federal and Illinois law, that

judges know and follow the law); *Renico v. Lett*, 559 U.S. 766, 777-78 (2010) (under AEDPA, deferring to state supreme court's plausible interpretation of trial court's actions, although others were possible).

Respondent is wrong that there is only one way for the judge's remarks to be read. Put most plainly, Respondent presumes that the inference about motive could only have led *to* the verdict, when it is at least as plausible that the inference flowed *from* it. That is, having found him guilty, the judge speculated as to why Respondent killed Nelson, something he would have had no reason to do if he was not convinced of Respondent's guilt. See Pet.Br. 22.

Consider the context. When the judge announced his verdict, it was after hearing the testimony of two eyewitnesses who both repeatedly identified Respondent as the killer. JA26, JA63, JA65, JA68-69, JA81. He heard no testimony to the contrary, and Respondent's trial strategy was to try to cast doubt on the State's witnesses rather than to assert an alternative theory of the case. JA121-22; JA127. In closing argument, both the State and Respondent emphasized that the question in the case was identity, and neither discussed motive. JA110, JA116. In response to the unrebutted eyewitness testimony and the lawyers' emphasis on identity in their arguments, the judge's comment that "the witnesses skirted the real issue" and his speculation about motive, JA133, could easily have meant, for example, that identity was so well-established by the evidence that the only part of the story left untold—that is, the remaining "real issue"—was why Respondent killed Nelson.

And contrary to Respondent's claim, Resp.Br. 2-3, 41-42, there was evidence to support the judge's

statement that "[Respondent] wanted to knock [Nelson] off. I think the State's evidence has proved that fact," JA133. The State's evidence established that Respondent walked up to Nelson and beat him over the head with a baseball bat. That evidence easily established that Respondent wanted to "knock [Nelson] off." Moreover, Respondent admits that the evidence established that Nelson was a drug dealer. Resp.Br. 1. Thus, the only statement the judge made that required a disputable inference was that Respondent knew that Nelson was dealing drugs. And as already explained, that inference likely flowed *from* the verdict, instead of contributing to it.

Contrary to Respondent's claims, the trial judge never said that he did not "credit[]" the "identification testimony," Resp.Br. 40; nor did he express "clear rejection of the eyewitnesses' testimony," Resp.Br. 48. The trial court did not "explicitly bas[e] its guilty verdict on fact-findings of knowledge and motive that absolutely no evidence at trial supported," Resp.Br. 39; it did not say that it found the inferred motive "*outcome-determinative*," Resp.Br. 47 (emphasis in original); it did not " 'affirmatively stat[e] on the record that this manufactured evidence [of motive] constituted the basis of its verdict,' " Resp.Br. 4 (quoting Illinois Appellate Court dissent, App. 128a); it did not "state[] on the record that it was finding the defendant guilty based on key facts that had no support in the trial record," Resp.Br. 2; and it did not "explain[] that its reason for finding [the] defendant guilty rests on facts supported nowhere in the trial record," Resp.Br. 34. No matter how many times Respondent asserts otherwise, it is *not* an "indisputable fact that the trial court based its guilty verdict on facts with no evidentiary basis," Resp.Br. 32.

Thus, Respondent's arguments depend on asserting his own inferences—that the trial judge did not think the evidence was sufficient and that he would not have found Respondent guilty if he had not inferred a motive— as if they were fact. But repeating them does not make them so. Because Respondent's reading of the judge's remarks takes every inference against the State, assumes that the judge deliberately convicted him lawlessly, and rejects the Illinois Appellate Court's contrary conclusion that he followed the law, it is impermissible. And all of Respondent's legal arguments flow from that flawed reading.

II. No Clearly Established Precedent Supports Respondent's Claims.

As explained in Part I, Respondent posits an impermissible and improbable interpretation of the trial judge's remarks in an attempt to make his claim fit into the scope of clearly established precedent. When the judge's actual remarks are considered, however, it becomes obvious that no clearly established precedent reaches this case. This Court has never held that a defendant's due process rights are violated when a finder of fact infers a fact not directly established by the record evidence, unless (1) some improper outside information or circumstance could have prejudicially influenced the verdict, or (2) the record evidence is insufficient to support the elements of the crime. And neither of these circumstances is present here. Nor has this Court ever held that a factfinder's inference of a fact that is not an element can violate due process. For these reasons alone, Respondent's habeas claim fails.

Respondent also stretches the scope of such precedent by cherry-picking language from this Court's decisions without regard to legal or factual context. He

thus ignores the admonition against "fram[ing] the issue at too high a level of generality" in discussing whether there is clearly established precedent that can support habeas relief. *Donald*, 135 S. Ct. at 1377; see also *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam) ("caution[ing] the lower courts . . . against 'framing our precedents at such a high level of generality' ") (quoting *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam)).

This warning against articulating an overbroad rule is particularly apt when a habeas petitioner alleges a general violation of his due process rights. After all, this Court's precedent clearly establishes the general rule that all defendants have a right to a fair trial. See, *e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) ("[A] fair trial in a fair tribunal is a basic requirement of due process.") (internal quotation marks and citations omitted). But such precedent does not mean that every unfair trial allegation necessarily invokes a clearly established precedent for purposes of AEDPA. To the contrary, this Court has rejected claims alleging a denial of a fair trial in violation of due process on the grounds that there was no clearly established law on point. See, *e.g.*, *Carey v. Musladin*, 549 U.S. 70, 72 (2006) (due to absence of clearly established precedent, denying habeas petitioner's claim of unfair trial); *cf. Anderson v. Creighton*, 483 U.S. 635, 639 (1987) ("[T]he right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right" for purposes of qualified immunity).

Similarly, here, the general rule Respondent points to—that a defendant has a right to be convicted based on the evidence adduced at trial—is "far too abstract to clearly establish the specific rule [R]espondent needs," *Smith*, 135 S. Ct. at 4, which is that a trial judge's inferences about a non-element fact can violate due process.

A. None of Respondent's cases clearly establish the rule he needs.

The cases on which Respondent relies, see Resp.Br. 25-28, share two common, dispositive distinctions from this case: (1) the finder of fact was exposed to possibly prejudicial outside information or circumstances, and (2) the finder of fact was a jury, not a judge. These differences preclude those cases from clearly establishing the constitutional rule Respondent needs to obtain habeas relief.

In *Taylor v. Kentucky*, 436 U.S. 478 (1978), for example, this Court held that a defendant's right to a fair trial was violated where the prosecution invited the jury to infer his guilt from the fact that he had been arrested and indicted and where the court provided inadequate instructions regarding the State's burden of proof. 436 U.S. at 485-88. The State repeatedly invited the jury to consider Taylor's status as a criminal defendant as evidence of guilt, thus creating a "genuine danger" that the jury would convict him based on this circumstance, which is not even admissible as evidence. *Id.* at 487-88. It was in that context that this Court explained "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on * * * circumstances not adduced as proof at trial." *Id.* at 485. Those

"circumstances not adduced as proof at trial," however, were actual statements made to the jury. Here, in contrast, Respondent can point to no such improper statements. See Pet.Br. 17 (discussing *Taylor*).

Turner v. Louisiana, 379 U.S. 466 (1965), is equally inapposite. There, this Court held that a defendant's due process rights were violated when two sheriff's deputies who had provided key testimony for the State had charge of the jury outside the courtroom for the three-day trial. *Id.* at 473-74. The risk of prejudice in that context—the possibility that the jury would learn information from the deputies outside the courtroom, for example—was too great, and so a new trial was necessary. *Ibid.* Respondent, however, has alleged no potentially prejudicial influence on his trial judge.

Likewise, in *Irvin v. Dowd*, 366 U.S. 717, 724-29 (1961), this Court held that a defendant's due process rights were violated where pretrial media coverage engendered deep and bitter prejudice throughout the community. See also *Sheppard v. Maxwell*, 384 U.S. 333, 354-55 (1966) (holding due process was violated by the extent and nature of trial publicity and media conduct); *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (holding right to fair trial potentially violated where defendant compelled to appear before jury in prison attire, but no violation occurred because defendant failed to object); *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986) (holding right to fair trial not violated by presence of additional, uniformed security personnel in courtroom). No such risk of outside information or influences was present at Respondent's trial. Thus, these cases cannot provide the necessary clearly established precedent to warrant relief. See *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) ("Section

2254(d)(1) * * * does not require state courts to *extend* [Supreme Court] precedent or license federal courts to treat the failure to do so as error.") (emphasis in original).

Moreover, all of these cases considered an improper outside influence in a jury trial. But Respondent waived his right to a jury, JA6, and judges are presumed less susceptible to improper influences than juries, see *Williams v. Illinois*, 132 S. Ct. at 2235 (noting presumption). Respondent, however, makes no attempt to address this distinction between the cases he relies on and his own circumstance, illustrating that these cases do not provide the requisite clearly established precedent.

Respondent correctly notes that a habeas petitioner need not show that this Court has previously decided a case with nearly identical facts. Resp. Br. 33. But here, where no outside influence potentially affected the finder of fact's verdict, and the trier of fact was a judge, not a jury, Respondent cannot satisfy § 2254(d)(1)'s narrow requirement that "it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Woodall*, 134 S. Ct. at 1706-07 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Indeed, even if it would be reasonable to extend the clearly established precedent to respondent's claim, or unreasonable not to, the fact that such an extension would be necessary means Respondent's claim must fail on habeas review. *Id.* at 1706.

B. No other clearly established rule, as announced by this Court, applies to Respondent's claim.

A second type of due process violation that Respondent hints at it is based on the requirement that the evidence be sufficient to establish every element of a crime beyond a reasonable doubt. See, *e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). But Respondent does not argue that the evidence was insufficient with respect to any element of his crime of murder, and any such argument would be frivolous. Two eyewitnesses testified that they saw Respondent beat Nelson over the head with a bat, so there was evidence to support every element of first degree murder—that Respondent killed Nelson, and that either he intended to kill or do great bodily harm, or he knew that his acts would cause, or had a strong probability of causing, death or great bodily harm. See 720 ILCS 5/9-1(a) (1998) (defining elements of first degree murder); Pet.Br. 23 (discussing elements). Indeed, even the Seventh Circuit acknowledged that the evidence was sufficient to sustain a convcition. App. 4a.

Moreover, convictions requiring extra-evidentiary inferences, such as inferences based on common sense and experience, are regularly upheld. See, *e.g.*, *Barnes v. United States*, 412 U.S. 837, 844-45 (1973) (unexplained possession of stolen goods sufficient evidence from which jury could infer that defendant knew goods were stolen); *Coleman v. Johnson*, 132 S. Ct. 2060, 2065 (2012) (per curiam) (jury could infer requisite knowledge and intent from actions of defendant and co-defendant). And if such inferences are permissible to support finding an element of a crime, as in *Barnes* and *Johnson*, then they are

certainly permissible to support a factual conclusion about a non-element, as in this case. In any event, Respondent has long since forfeited any sufficiency-of-the-evidence claim. See Pet.Br. 23-24.

Respondent unsuccessfully invokes other due process principles. He argues, for example, that because there was no direct evidence of his knowledge of Nelson's drug dealing, he was deprived of an opportunity to "confront or cross-examine on those facts." Resp.Br. 29. But this argument boils down to a claim that it violates due process for a finder of fact to convict on the basis of a theory of the case different from that urged by the State, or even to make inferences based on its own common sense and experience if the defendant has no opportunity to counter them. There is no basis in law for such a claim, and a defendant is not entitled to inquire into the factfinder's thought processes, even (unlike here) where a judge has issued a verdict that is logically inconsistent. See *Harris v. Rivera*, 454 U.S. 339, 344-48 (1981); see also *Amici* Br. 11. The due process backstop to convictions based on unreasonable inferences is review for sufficiency of the evidence, not an inquiry into or speculation about the mental processes of the finder of fact. *United States v. Powell*, 469 U.S. 57, 67 (1984).

Respondent's invocation of the presumption of innocence likewise fails. See Resp.Br. 26-27, 41-42. These arguments rest squarely on Respondent's faulty representation of the facts. Contrary to Respondent's suggestions, the judge did not state that the evidence was insufficient but that he was going to find the defendant guilty anyway. See *supra*, Part I.

Nor is Respondent correct that Petitioner's position means that even a "flagrant" constitutional violation would be immune from habeas relief if no comparable facts had previously been addressed by this Court. Resp.Br. 34. To the contrary, if a trial judge at a bench trial were to announce, for example, that he was finding the defendant guilty only because he had previously presided over a trial in which the defendant's brother had been convicted of a similar crime, that would be a violation of the clearly established precedent of *Taylor* and *Turner* because the factfinder would be relying on extra-evidentiary information. But there is no such "flagrant" violation here. Only by positing an interpretation of the record that is both implausible and impermissible can defendant even begin to suggest that he is entitled to relief.

Finally, Respondent makes the puzzling argument that Petitioner's reliance on this Court's decisions is misplaced because "not a single case denies habeas relief with a fact scenario that squarely violates a constitutional right," and because the Court's per curiam decisions "generally involve facts that simply do not qualify as constitutional violations." Resp.Br. 36. This argument is both circular and factually incorrect. First, if "a fact scenario" did "squarely violate[] a constitutional right" the case would involve clearly established precedent that would justify relief. The cases denying relief do not involve a square violation of a constitutional right because cases denying relief, by definition, do not involve a violation or misapplication of clearly established precedent. Respondent's argument is, in that regard, entirely circular.

Second, habeas relief cannot be granted under AEDPA even where a constitutional violation may have occurred but where no clearly established precedent of this Court has addressed that violation. Habeas decisions therefore often do not even address the underlying question of *whether* a violation occurred, so it is not possible to say that the cases "generally involve facts that simply do not qualify as constitutional violations," Resp.Br. 6. The Court emphasized that distinction in *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013) (per curiam), one of the cases on which Respondent relies. See Resp.Br. 36. In *Rodgers*, the Court, finding no clearly established Supreme Court precedent on point, rejected habeas relief for a petitioner who had requested appointment of counsel for help with a post-trial motion when he had previously waived representation. *Id.* at 1447-48. Contrary to Respondent's suggestion, Resp.Br. 36, the Court did not even hint that there was no underlying violation. Rather, it "expresse[d] no view on the merits of the underlying Sixth Amendment principle * * * And it [did] not suggest or imply that the underlying issue, if presented on direct review, would be insubstantial." 133 S. Ct. at 1451.

Musladin, 549 U.S. 70, which Respondent discusses, Resp.Br. 38-39, is another good example. There, this Court held that precedent involving state action at a trial did not clearly establish that *spectator* conduct—in *Musladin*, wearing buttons with a picture of the victim's face—could violate a defendant's due process rights. 549 U.S. at 77. But this Court did not decide that such conduct would never violate due process. In fact, Justice Kennedy, concurring in the judgment, called for consideration of whether "as a preventive measure, or as a general rule to preserve

the calm and dignity of a court," such buttons should be "prohibited as a matter of course." *Id.* at 81 (Kennedy, J., concurring in judgment). He emphasized, however, that such a rule would be "new" and thus could not "be grounds for relief in the procedural posture of this case." *Ibid.*

* * *

Where, as here, no clearly established Supreme Court precedent supports Respondent's claim, habeas relief is unavailable.

III. The Illinois Appellate Court's Holding That The Trial Judge Relied Solely On Competent Trial Evidence To Find Respondent Guilty Of Murder Was Not Objectively Unreasonable.

Respondent claims that his conviction violated his due process right to be convicted based solely on the evidence at trial. Resp. Br. 21-22. Even if Respondent were correct that this general principle constitutes clearly established federal law that could apply to his claim, he is still not entitled to relief. The Illinois Appellate Court denied Respondent's claim on the merits. Although Respondent insists that the Illinois Appellate Court held that the trial judge committed error, Resp.Br, 3, 15, in fact, that court explicitly held the opposite: "Nevertheless, despite the trial judge's comments, in a bench trial, it is presumed that the trial judge considered only competent evidence in reaching his verdict." App. 118a. And there was no error if only competent evidence was considered.

Because the Illinois Appellate Court decided the case on the merits, the highly deferential AEDPA standard applies, and Respondent must show that "the earlier state court's decision 'was contrary to' federal

law then clearly established in the holdings of this Court * * * or that it 'involved an unreasonable application' of such law." *Richter*, 562 U.S. at 100 (quoting 28 U.S.C. § 2254(d)(1); other citation omitted). Respondent cannot meet that burden here because it was not "objectively unreasonable," *Williams v. Taylor*, 529 U.S. 362, 409 (2000), for the Illinois Appellate Court to reject Respondent's claim on the merits.

The Illinois Appellate Court relied on the presumption "that the trial judge considered only competent evidence in reaching his verdict." App. at 118a.[1] The presumption that judges know and follow the law is not unique to Illinois. See *Williams v. Illinois*, 132 S. Ct. at 2235; *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). And it is particularly appropriate on federal habeas review. See *Visciotti*, 537 U.S. at 24 (noting "presumption that state courts know and follow the law" and "§ 2254(d)'s highly deferential standard for evaluating state-court rulings, * * * which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted). As this Court recently explained, "[w]hen reviewing state criminal convictions on collateral review, federal judges are required to afford state

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[1] Respondent makes much of the fact that the court in *People v. Worlds*, 400 N.E.2d 85, 86-87 (Ill. App. 1980), found the presumption rebutted where the judge in a bench trial elicited information about the defendants' criminal records at the beginning of the trial. Resp.Br. 31. But the Illinois Appellate Court's citation of *Worlds*, coupled with the fact that the use of the presumption was one of the dissent's express points of disagreement, App. 128a, indicates that the court did not apply the presumption unthinkingly.

courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Donald*, 135 S. Ct. at 1376; see also, *e.g.*, *White v. Wheeler*, 136 S. Ct. 456, 460 (2015) (per curiam) (where state reviewing court owes deference to trial court, and federal court owes deference to state reviewing court under AEDPA, federal habeas review must be "doubly deferential").

Here, it was not objectively unreasonable to conclude that the trial judge relied only on the trial evidence to convict Respondent. He was presented with not one, but two, eyewitnesses who had repeatedly identified Respondent as Nelson's killer both before and during the trial, as well as Respondent's own flight from police when stopped for a traffic violation. Nor did the trial court engage in any speculation regarding why Respondent might have wanted this drug dealer dead (such as a battle for territory or a dispute over money or drugs). That is, the trial court did not say, "I'm not sure who killed Ramon Nelson, but Respondent had a reason to, so it was probably him." Rather, after the State proved the identity of the killer, the trial court inferred the one part of the story left untold: why Respondent committed the murder.

Respondent's discussion of *House v. Bell*, 547 U.S. 518 (2006), Resp.Br. at 40-41, is thus inapposite. Respondent points out correctly that although motive is not an element of the crime of murder, *House* shows that motive can be important evidence in establishing the identity of the killer. But in *House*, the State presented only circumstantial evidence and relied in closing argument on the defendant's motive to establish his identity as the killer. 547 U.S. at 540. In contrast, here, the State presented unrebutted eyewitnesses who identified Respondent as the killer,

and offered no evidence of motive at all. So, while the identity of the killer was central to both cases—as it is to many, if not most, murder cases—here, unlike in *House*, the State established identity directly and did not need to rely on motive evidence.[2]

To be sure, the Illinois Appellate Court admonished the trial judge that it would have been advisable for him to explain his credibility assessments and other findings. App. 120a. But Respondent points to, and Petitioner is aware of, no state law requiring the trial court to do so, much less a clearly established federal constitutional requirement. *Cf. Rivera*, 454 U.S. at 348 (holding there is no federal constitutional requirement that state trial judge in bench trial provide explanation for inconsistent verdicts). The Illinois Appellate Court's statement that the trial court's speculation "will be construed as harmless error," App. 120a, appearing in the same paragraph of the opinion as the admonishment, was not a holding that constitutional error occurred. *Contra* Resp.Br. at 3-4. And the trial judge's failure to articulate specific credibility determinations and factual findings from the trial evidence does not make it objectively unreasonable to apply the presumption that he, nevertheless, relied on that evidence to reach his verdict. For these reasons, respondent's additional suggestion that the Illinois Appellate Court had a constitutional obligation to remand the case to the trial court with instructions to articulate its credibility

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[2] *People v. Smith*, 565 N.E.2d 900, 906 (Ill. 1990), on which Respondent also relies, is similarly distinguishable because there, unlike here, "the State undert[ook] to prove facts which the State assert[ed] constitute[d] a motive for the crime charged."

determinations regarding the State's witnesses, Resp.Br. 52, is misplaced.

It is presumed that judges consider only competent evidence in reaching their verdicts, See *Williams v. Illinois*, 132 S. Ct. at 2235; *Visciotti*, 537 U.S. at 24, and the record here supports the application of that presumption. Therefore, it was not objectively unreasonable for the Illinois Appellate Court to reject Respondent's due process claim. Respondent cannot show that the demanding standard of § 2254(d)(1) has been met, and he is not entitled to habeas relief.

IV. Even If An Error Occurred, It Did Not Cause Actual Prejudice to Respondent.

Respondent's arguments that the alleged error was not harmless suffer from several significant defects. Notably, he betrays a fundamental misunderstanding of harmless error analysis on habeas review. Unlike on direct appeal, on habeas review, the State need not prove that a constitutional error was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18 (1967). Rather, "habeas petitioners 'are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice.' " *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (quoting *Brecht*, 507 U.S. at 637).

Instead of attempting to establish this prejudice, Respondent critiques the Illinois Appellate Court's *reasoning* when it applied *Chapman*. Resp.Br. 45-48. But that critique is irrelevant. The relevant question related to *Chapman* on habeas review is whether the state court's *conclusion* was "'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of

fairminded disagreement,' " *Ayala*, 135 S. Ct. at 2199 (quoting *Richter*, 562 U.S. at103). The state court's reasoning is not what is under review.

More importantly, the petitioner must meet the even more daunting *Brecht* standard. See *Ayala*, 135 S. Ct. at 2199 ("a prisoner who seeks habeas corpus relief must satisfy *Brecht*"); see also *id.* at 2211 (Sotomayor, J., dissenting) (agreeing that *Brecht* applies on federal habeas review). And *Brecht* applies even when the state court did not apply *Chapman* at all. *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007). Respondent, however, makes little effort to show that he meets *Brecht*'s requirement of "actual prejudice." 507 U.S. at 637

Respondent does not, and cannot, demonstrate that the trial court's speculation that Respondent knew Nelson was a drug dealer, even if improper, had a "substantial and injurious effect on his verdict." *Ayala*, 135 S. Ct. at 2197-98 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). More likely, and as already explained, it had no effect at all on the verdict. Instead, the trial court's speculation as to motive followed *from* the trial court's conclusion, based on evidence, that Respondent killed Nelson.

Respondent argues that "the trial court had many good reasons in the trial record *not* to credit the State's eyewitnesses," Resp.Br. 52 (emphasis in original), and reviews their testimony as if his brief were a closing argument at trial. But that the witnesses were imperfect and the judge was not compelled to believe them does not establish "actual prejudice." Respondent's claim here is that because the judge did not fully explain his reasoning and credibility determinations, the federal courts must presume the worst. Such speculation cannot substitute for *Brecht*'s

requirement that Respondent suffer actual prejudice, and it is inappropriate on habeas review.

Respondent also relies on *Sullivan v. Louisiana*, 508 U.S. 275 (1993), to suggest that the trial court's verdict without explicit credibility determinations and the Illinois Appellate Court's subsequent review for harmless error undermine both the jury's role and the presumption of innocence, Resp.Br. 50. But *Sullivan* is inapposite. *Sullivan* protects a right that Respondent has long since waived, see JA6—the Sixth Amendment right to have a jury find him guilty beyond a reasonable doubt. 508 U.S. at 277-78. In *Sullivan*, the jury received incorrect instructions about the State's burden of proof, which this Court held constitutes structural error to which harmless error analysis does not apply. *Id.* at 281-82. In a case in which there is no jury, *Sullivan* is not relevant.

Respondent certainly retained his due process right to be found guilty beyond a reasonable doubt by the judge. *Jackson*, 443 U.S. at 317. But he does not claim that the judge was unaware of or did not understand the State's burden of proof. So even if *Sullivan* had some relevance for bench trials, it would not apply here.

And Respondent is wrong when he implies that by reviewing the trial evidence, including considering whether Johnnie's testimony was reliable, the Illinois Appellate Court usurped the factfinder's function. Resp.Br. 50-51. Were this argument correct, it would render harmless error review meaningless. In the absence of structural error, as in *Sullivan*, there is nothing inappropriate about the appellate court evaluating the evidence for its reliability when engaging in harmless error analysis. See *Yates v.*

Evatt, 500 U.S. 391, 404 (1991) (overruled on other grounds by *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991) (appellate court must weigh probative force of evidence against probative force of error standing alone).

Moreover, this Court and others have long recognized that a state appellate court can resolve a question of fact, or, as AEDPA puts it, make "a determination of a factual issue," 28 U.S.C. § 2254(e)(1). See, *e.g.*, *Sumner v. Mata*, 449 U.S. 539, 545-46 (1981) (pre-AEDPA case); *Clements v. Clarke*, 592 F.3d 45, 47 (1st Cir. 2010); *Mendiola v. Schomig*, 224 F.3d 589, 592-93 (7th Cir. 2000). And AEDPA explicitly provides that such a determination "shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Thus, the Illinois Appellate Court's review of the evidence was not only unremarkable as part of harmless error analysis but it is entitled to deference on federal habeas review.

Contrary to Respondent's assertion, Petitioner is not conflating AEDPA's standards under § 2254(d)(1), § 2254(d)(2), and § 2254(e)(1). Petitioner does not claim that § 2254(e)(1) applies to the state appellate court's legal conclusion that any error was harmless; rather it applies to that court's fact-based determination that Johnnie's testimony was reliable. See App. 117a, 119a-122a (citing and applying *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)); *Sumner*, 449 U.S. at 542 (reviewing state appellate court factual determinations about identification process); *id.* at 546-47 (insisting on deference to those factual determinations). The evaluation of the legal conclusion of harmless error, which as already explained, relies on *Brecht*, must be made in light of this factual determination by the

Illinois Appellate Court. 28 U.S.C. § 2254(e)(1); see also *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005)

Finally, Respondent incorrectly claims that Petitioner has waived reliance on § 2254(e)(1). Section 2254(e)(1) is as relevant to *this* Court's analysis of this case as it was to the Seventh Circuit's. This Court must itself properly apply AEDPA, and for this reason, the appropriate application of § 2254(e)(1) is fairly included in the Question Presented. See *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980) (Where "determination of [a]question is essential to the correct disposition of the other issues in the case, we shall treat it as 'fairly comprised' by the questions presented in the petition for certiorari.").

* * *

Respondent cannot establish that he suffered actual prejudice from the error he alleges. For that reason alone, he cannot obtain habeas relief.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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No. 14-1516

In The Supreme Court Of The United States

STEPHEN DUNCAN,

PETITIONER,

v.

LAWRENCE OWENS,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMICUS BRIEF OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, DELAWARE, FLORIDA, IDAHO, INDIANA, KANSAS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, OHIO, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

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PETITION FOR CERTIORARI FILED JUNE 22, 2015
CERTIORARI GRANTED OCTOBER 1, 2015

QUESTION PRESENTED

Section 2254(d)(1) of Title 28 of the United States Code requires that any claim adjudicated on the merits in state court be contrary to, or an unreasonable application of, clearly established Supreme Court precedent before habeas relief may be granted. In this case, Respondent was convicted of murder at a bench trial, and in announcing the verdict, the trial judge made an inference concerning Respondent's motive, which was not an element of the crime. Respondent claimed that the judge made improper "extrajudicial" findings regarding his motive and thus found him guilty based on evidence not produced at trial. The state appellate court upheld Respondent's conviction, holding that the trial court's inference regarding motive, if error, was harmless. The Seventh Circuit overturned Respondent's conviction on habeas corpus review, finding that the trial court's inference about motive violated Respondent's right to have his guilt adjudicated solely on the evidence introduced at trial, relying on Supreme Court decisions involving juries exposed to impermissible information or influences, and finding the error not harmless.

Did the Seventh Circuit violate 28 U.S.C. § 2254 and a long line of this Court's decisions by awarding habeas relief in the absence of clearly established precedent from this Court?

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INTEREST OF AMICI CURIAE[1]

The amici States have a strong interest in ensuring that the finality of convictions obtained in their state courts is respected in federal court. The States' attorneys general have the primary responsibility for defending the validity of these convictions in federal habeas corpus proceedings, and consequently have a compelling interest in the proper and consistent application of the deferential standards of review Congress imposed in the Antiterrorism and Effective Death Penalty Act (AEDPA). The decision below threatens these interests by granting habeas relief in contradiction to AEDPA's deferential standards. By not giving proper deference to the state court, and using its own precedent to create and apply a rule not clearly established in a holding of this Court, the Seventh Circuit failed to comply with the requirements of 28 U.S.C. § 2254(d)(1).

SUMMARY OF ARGUMENT

AEDPA imposes a highly deferential standard that federal courts must apply when reviewing a state court's decision on a federal claim. This standard creates a modified res judicata rule that bars re-litigation of a claim decided in state court unless the petitioner proves the state court decision

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[1] Counsel of record received timely notice of the States' intent to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the States to file this brief.

was contrary to or an unreasonable application of clearly established federal law as determined by this Court.

AEDPA's deferential standard first requires that the law applied to grant relief be clearly established in a holding of this Court. Circuit courts may no longer grant relief based upon rules developed in their own precedent, even when the circuit law just extended this Court's precedent. If this Court has not decided the issue in a prior holding, the rule is not clearly established federal law, and 28 U.S.C. § 2254(d)(1) bars relief.

AEDPA also requires that the state court decision be either contrary to, or an unreasonable application of, the federal law clearly established by this Court. This requires more than a finding that the state court clearly erred. The state court must have unreasonably applied the applicable federal law. Under this standard, the state court decision must be so unreasonable that fair minded jurists could not disagree as to the incorrectness of the decision. There must have been no reasonable basis for the state court to have denied relief.

Here, the Seventh Circuit did not comply with AEDPA. The circuit court did not apply a rule clearly established in a holding of this Court. Instead, using isolated sentences from this Court's opinions, the Seventh Circuit applied a highly generalized principle to find constitutional error. The circuit court then granted relief after finding that error had caused actual prejudice. Giving no deference to the state court, the Seventh Circuit did not decide whether the state court's harmless error decision was

unreasonable. Instead, the circuit court granted relief based upon its own independent, de novo determination of prejudice. By doing so, the court violated AEDPA.

ARGUMENT

A. AEDPA Reformed Habeas Rules by Imposing a Highly Deferential Standard for Reviewing State Court Adjudications

The Antiterrorism and Effective Death Penalty Act (AEDPA) expressly limits the power of federal courts to grant relief to state prisoners. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). AEDPA circumscribes federal review of claims decided in state court by creating "an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007). Under AEDPA, "a federal court may grant habeas relief on a claim 'adjudicated on the merits' in state court only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting 28 U.S.C. § 2254(d)(1)). Congress imposed this highly deferential standard of review to reform habeas and "'to further the principles of comity, finality, and federalism.'" *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)).

Over the course of the 20th Century, the scope of the writ had been expanded, from a limited inquiry into the jurisdiction of the sentencing court,

into a full de novo review of the federal claims. *Kuhlmann v. Wilson*, 477 U.S. 436, 446 (1986) (summarizing the history of the writ); *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) (same). In this de novo review, a federal court would not defer to the state court's resolution of a claim, but would instead exercise its independent judgment when deciding questions of law and mixed questions of law and fact. *Sykes*, 433 U.S. at 78; *Williams*, 529 U.S. at 400. While the federal court could "give great weight to the considered conclusions of a coequal state judiciary," the court owed no deference to the state court, and was not bound by the state court's conclusions on questions of federal law. *Miller v. Fenton*, 474 U.S. 104, 112 (1985). The state court's decision on the claim was simply "due the same respect as any other 'persuasive, well-reasoned authority.'" *Williams*, 529 U.S. at 402. Unlike most civil cases, the state court resolution of the claim was not res judicata on habeas review. *Sykes*, 433 U.S. at 80 (quoting *Brown v. Allen*, 344 U.S. 443, 458 (1953)).

Congress enacted AEDPA specifically to implement habeas reform by constraining the expansive de novo review that had developed over the 20th Century. *Garceau*, 538 U.S. at 206. Congress recognized that "'[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quoting *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) (internal quotation marks omitted)). Habeas review "'disturbs the State's significant interest in

repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Harrington*, 562 U.S. at 103 (quoting *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)). To protect the finality of state court judgements, and to further the principles of comity and federalism, Congress enacted AEDPA to place a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners. *Garceau*, 538 U.S. at 206.

A federal court may no longer grant the writ simply because the court concludes in its independent judgment that prejudicial error has occurred. *Williams*, 529 U.S. at 411; *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). Rather, the federal court may grant relief only if the state court decision on the claim was contrary to or an unreasonable application of clearly established federal law. *Sarausad*, 555 U.S. at 190. The state court must have reached a legal conclusion opposite to that reached by this Court (*Williams*, 529 U.S. at 405) or have unreasonably applied the holdings of this Court to the facts of the case. *Holland v. Jackson*, 542 U.S. 649, 652 (2004). It is not enough that the state court conclusion was erroneous. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). To grant relief, the state court decision must have been unreasonable. *Id.*

Under this standard, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fair minded jurists could disagree' on the correctness of the state courts decision." *Harrington*, 562 U.S. at 101 (citing

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). The petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement." *Harrington*, 562 U.S. at 103.

The AEDPA standard requires the petitioner to bear the heavy burden of showing "there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98. "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102. While AEDPA "stops short of imposing a complete bar on federal-court re-litigation of claims already rejected in state proceedings," the statute does impose a modified res judicata rule that constrains the federal court's authority to substitute its judgment for that of a state court on the correct resolution of the claim of constitutional error. *Id.* "By its terms § 2254(d) bars re-litigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)." *Id.* at 98. AEDPA preserves the federal court's authority to issue the writ only "where there is no possibility fair minded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Id.* at 102. "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

AEDPA "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). Readiness to find reversible constitutional error is inconsistent with the deferential standard demanded by AEDPA. *Id.*; *see also Brown v. Payton*, 544 U.S. 133, 141-47 (2005); *Bell v. Cone*, 543 U.S. 447, 455 (2005).

B. The Seventh Circuit Failed to Apply the Deference Required Under AEDPA

1. AEDPA Limits Review to Clearly Established Federal Law

The phrase "clearly established Federal law" in 28 U.S.C. § 2254(d)(1) refers "to the holdings, as opposed to the dicta," of this Court's decisions. *Williams*, 529 U.S. at 412. As a general matter, the holding of a decision is limited to the final result of the case as well as the portions of the opinion necessary to that result. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). A sentence in an opinion is dicta if it was not essential to the disposition of the contested issues. *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001). An expression by the Court that goes beyond the point actually decided is not a holding. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626-27 (1935). "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001).

As this Court's cases construing § 2254(d) make clear, implications that purportedly follow from a holding are insufficient to create clearly established federal law. *Glebe v. Frost*, 135 S. Ct.

429, 430-32 (2014) (decision that a complete denial of summation was structural error did not clearly establish that a lesser restriction of argument was also structural error); *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (decision establishing the right to self-representation did not clearly establish a right to access the law library); *Thaler v. Haynes*, 559 U.S. 43, 47-49 (2010) (holdings on *Batson* claims did not clearly establish a rule that a judge must personally observe the juror's demeanor before concluding the demeanor provides a race neutral reason for excluding the juror); *Berghuis v. Smith*, 559 U.S. 314, 329-33 (2010) (precedent did not clearly establish a specific method state courts must use in reviewing a claim that the jury was not drawn from a fair cross section of the community); *Renico v. Lett*, 559 U.S. 766, 773-79 (2010) (precedent did not clearly establish a particular standard for determining whether a trial court abused its discretion in declaring a mistrial on a hung jury); *Mickens v. Taylor*, 535 U.S. 162, 174-76 (2002) (precedent on conflict of interest did not clearly establish the rule applied to other types of conflicts).

A highly generalized principle derived from isolated sentences of this Court's opinions does not constitute clearly established federal law under § 2254(d). *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) ("We have before cautioned the lower courts . . . against 'framing our precedents at such a high level of generality.'" (quoting *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam))); *see also Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (in the qualified immunity context, the Court has "repeatedly told courts . . . not to define clearly

established law at a high level of generality"); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (same). While "the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law" (*Marshall v. Rodgers*, 133 S. Ct. 1446, 1449 (2013)), "clearly established" still requires, at the very least, that "existing precedent must have placed the statutory or constitutional question beyond debate." *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (quoting *al-Kidd*, 131 S. Ct. at 2083 (concluding that a police officer was entitled to qualified immunity because the constitutional rule applied by the circuit court was not clearly established)).

If this Court has not addressed the issue in a holding, the rule is not clearly established, and the state court adjudication cannot be an unreasonable application of clearly established federal law. *Carey v. Musladin*, 549 U.S. 70 (2006). Similarly, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) (quoting *Yarborough*, 541 U.S. at 666). "AEDPA's carefully constructed framework 'would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.'" *Id.*

Similar to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), AEDPA's standard protects both the reasonable judgments of state courts and the State's interest in the finality of those judgments. *Williams*, 529 U.S. at 412; *see also Beard v. Banks*, 542 U.S. 406, 413 (2004). Like

Teague, the AEDPA standard reflects that the primary function of habeas review is to ensure that a conviction comported with clearly established law, and "not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990).

A rule is not clearly established unless reasonable jurists would have felt compelled by existing precedent to grant the relief required by the rule. *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Application of an old rule in a new setting, or in a manner not dictated by precedent, constitutes the creation of a new rule. *Stringer v. Black*, 503 U.S. 222, 228 (1992); *Butler v. McKellar*, 494 U.S. 407, 415 (1990). Extending precedent so as to apply an old rule in a novel setting does as much harm to the interests of finality, predictability, and comity as does the invocation of a new rule that was not dictated by precedent. *Stringer*, 503 U.S. at 228. Invalidating the state court adjudication because the state court did not extend this Court's precedent in a manner that this Court has not yet done would severely compromise the deference required under AEDPA. *See Glebe*, 135 S. Ct. at 430-31 (Ninth Circuit improperly extended structural error rule to grant relief). "Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Yarborough*, 541 U.S. at 666 (citing *Teague*, 489 U.S. 288).

2. Clearly Established Law Precludes an Inquiry into the Trier of Fact's Intrinsic Reasoning

The Seventh Circuit believed the state trial judge's comment about motive showed the verdict was based solely upon speculation, and not on the evidence presented at trial. But even if the comment showed impermissible speculation, this Court has stressed that reviewing courts should not grant relief based upon errors in the intrinsic reasoning and deliberations of the trier of fact. *United States v. Powell*, 469 U.S. 57, 66 (1984) (court should not inquire into reasoning of jury reaching inconsistent verdicts); *Harris v. Rivera*, 454 U.S. 339, 344-48 (1981) (court would not inquire into reasoning behind inconsistent verdicts in a bench trial). The Court has disapproved of an individual assessment of the reason for a particular verdict because it "would require inquiries into the jury's deliberations that the courts generally will not undertake." *Powell*, 469 U.S. at 66.

Clearly, if this were a jury trial, the federal courts could not inquire into the validity of the verdict based upon alleged intrinsic defects in the jury deliberations, even when jurors disclosed these defects in post-trial affidavits. Fed. R. Evid. 606(b); *Warger v. Shauers*, 135 S. Ct. 521, 525-30 (2014) (courts could not consider statements made by juror during deliberations about her prior experiences); *Tanner v. United States*, 483 U.S. 107, 117-27 (1987) (courts could not inquire post-trial into whether jurors were intoxicated during trial). The Court similarly has not clearly established a constitutional requirement for a judge to explain the reasoning

behind a verdict. *Rivera*, 454 U.S. at 344-45. Even where the trier of fact makes a comment that showed speculation about the defendant's motive, clearly established federal law does not allow an inquiry into the intrinsic reasoning used to reach the verdict. By invalidating the verdict based upon the alleged intrinsic reasoning of the trier of fact, the Seventh Circuit applied a rule that is not supported by, and conflicts with, this Court's existing precedent.

3. Sufficiency of the Evidence is the Proper Standard for Reviewing the Alleged Error in this Case

In reviewing the judge's comment, the proper standard is not to inquire into the judge's intrinsic reasoning, but to review the record for sufficiency of the evidence. "[A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Powell*, 469 U.S. at 67. "'The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached.'" *Rivera*, 454 U.S. at 348 n.20 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319-20 n.13 (1979)). The proper standard for reviewing the verdict does not permit the court to scrutinize "'the reasoning process actually used by the factfinder—if known.'" *Id.* In tead, the proper standard focuses on the sufficiency of the evidence presented at trial.

The clearly established law that the circuit court should have applied is the sufficiency of evidence standard. *Jackson*, 443 U.S. at 319. Under

this standard, "the relevant question is whether . . *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. The court must view the evidence in the light most favorable to the prosecution. *Id.* The court may grant relief only "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324.

The review of the record for sufficiency of the evidence is sharply limited, and the Court necessarily owes great deference to the trier of fact. *Wright v. West*, 505 U.S. 277, 296-97 (1992). To produce sufficient evidence to support a conviction, "the prosecution need not affirmatively 'rule out every hypothesis except that of guilt . . '" *Wright*, 505 U.S. at 296 (quoting *Jackson*, 443 U.S. at 326). "[A] reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Wright*, 505 U.S. at 296-97 (quoting *Jackson*, 443 U.S. at 326). Under AEDPA, the federal court must provide a high level of deference to the state court's determination of the sufficiency of the evidence. *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012); *Cavazos v. Smith*, 132 S. Ct. 2, 6 (2011).

The Seventh Circuit failed to review the record for sufficiency of the evidence and it failed to give any deference to the state court's consideration of the evidence. Instead of deferring to the state court, the Seventh Circuit justified its conclusion that there

was reversible error by characterizing the evidence of Owens' guilt as "weak proof." App. 10a. Conducting an independent examination of the record, the circuit court found flaws in the testimony of the two witnesses who saw Owens hit the victim in the head with a bat. App. 3a-4a. The circuit court simply failed to apply the proper deference required under AEDPA. *See Waddington v. Sarausad*, 555 U.S. 179, 194 (2009) (Ninth Circuit incorrectly characterized evidence as "thin" when finding the jury instruction violated due process).

The state appellate court reasonably determined the evidence was sufficient to prove the elements of the crime beyond a reasonable doubt. App. 116a-22a. The court recognized that the eyewitnesses contradicted each other on some points, and that one eyewitness was significantly impeached, but the court determined their testimony still supported the conviction. App. 119a-20a. Despite the contradictions, both eyewitnesses put Owens at the scene of the crime, and both identified Owens as the victim's assailant. App. 120a. There was no evidence that the eyewitnesses knew each other or had any reason to fabricate their testimony. App. 120a. Contrary to the conclusion of the Seventh Circuit, the state court determined that the testimony of one eyewitness was especially reliable. App. 120a-21a. The killing occurred in a well-lit area, just a few feet from that witness, and he saw Owens' face before and after the attack. App. 120a-21a.

In finding constitutional error, the Seventh Circuit failed to apply the correct legal standard, failed to view the evidence in the light most favorable to the prosecution, and failed to give any deference to

the state court's evaluation of the evidence. The Seventh Circuit violated AEDPA.

C. The Circuit Court Gave No Deference to the State Court's Determination of Harmless Error

A petitioner is entitled to relief on a constitutional trial error only if the error caused prejudice. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Like a ruling on the underlying error, the state court's determination that the error was harmless is an adjudication "on the merits" entitled to deference under 28 U.S.C. § 2254(d). *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015). Thus, "when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Fry v. Pliler*, 551 U.S. 112, 119 (2007) (citing *Mitchell v. Esparza*, 540 U.S. 12 (2003)). The federal court may not grant relief "if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Mitchell*, 540 U.S. at 18.

This Court has held that because the *Brecht* actual prejudice standard subsumes AEDPA, there is no need to formally apply both standards before the federal courts *deny* relief. *Davis*, 135 S. Ct. at 2199 (citing *Fry*, 551 U.S. at 119-20). A court may deny relief if the state court decision was not unreasonable, or the error did not cause prejudice. *Fry*, 551 U.S. at 120; *Davis*, 135 S. Ct. at 2199. But while a federal court need not formally apply both

the AEDPA and *Brecht* standards before denying relief, "AEDPA nevertheless 'sets forth a precondition to the grant of habeas relief.'" *Davis*, 135 S. Ct. at 2198 (quoting *Fry*, 551 U.S. at 119). The "Court did not hold—and would have had no possible basis for holding—that *Brecht* somehow abrogates the limitation on federal habeas relief that § 2254(d) plainly sets out." *Davis*, 135 S. Ct. at 2198.

Some courts, however, like the Seventh Circuit here, are *granting* relief after only finding actual prejudice. These lower courts have improperly construed the "subsume" language in *Fry* and *Davis* to eliminate the need to consider the reasonableness of the state court harmless error determination before granting relief. *See, e.g.*, *Blackston v. Rapelje*, 780 F.3d 340, 359 (6th Cir. 2015) (declining to apply both *Brecht* and AEDPA before granting relief); *Deck v. Jenkins*, 768 F.3d 1015, 1025 (9th Cir. 2014) (applying *Brecht* without deference to state court decision that error was harmless). Here, after finding actual prejudice under *Brecht*, the Seventh Circuit simply granted relief. The court did not consider whether the state court harmless error decision was an unreasonable application of clearly established federal law. App. 9a. But even when the federal court finds actual prejudice under *Brecht*, the state court's harmless error determination still has significance. *Davis*, 135 S. Ct. at 2198. The Seventh Circuit's avoidance of the state court's evaluation of the evidence fails to give the deference required under AEDPA. *Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1309 (11th Cir. 2012) (in determining prejudice issue, district court erred by affording no deference to the state court's view of the evidence).

The circuit court's determination that the error caused prejudice is nothing more than an independent determination that the state court erred in concluding the error was harmless. Such a ruling "fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). It is not enough that the federal court, in its independent review of the record, is left with a firm conviction that the error was prejudicial. *Id.* Before granting relief, the court must find the state court decision on the issue was unreasonable. *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002). Because the Seventh Circuit did not find the state court decision was unreasonable, AEDPA barred the grant of relief. *Davis*, 135 S. Ct. at 2198 ("Because the highly deferential AEDPA standard applies, we may not overturn the California Supreme Court's decision unless that court applied *Chapman* 'in an "objectively unreasonable" manner.'").

The finding of actual prejudice is not equivalent to finding the state court decision was unreasonable. Under the actual prejudice standard, "relief is proper only if the federal court has 'grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict."'" *Davis*, 135 S. Ct. at 2197-98 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). But if the courts are granting relief based upon a "doubt," or even a "grave doubt," then it is also possible fair minded jurists could necessarily disagree as to whether the error was prejudicial. If fair minded jurists could disagree, relief is barred

under 28 U.S.C. § 2254(d)(1). *Davis*, 135 S. Ct. at 2198-99. A determination that actual prejudice occurred, and the state court erred in finding harmless error, is not the same as finding the state court decision was unreasonable.

Here, the Seventh Circuit did not decide the reasonableness of the state court harmless error decision. In giving zero deference to the state court decision, the Seventh Circuit violated AEDPA. *Davis*, 135 S. Ct. at 2199 ("Ayala therefore must show that the state court's decision to reject his claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement.'"); *Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("even a strong case for relief does not mean the state court's contrary conclusion was unreasonable").

The state court could reasonably determine the error was harmless. The court reviewed the evidence of Owens' guilt, which included the direct identification of Owens by two unrelated eyewitnesses. App. 120a-21a. Even considering the defects in their testimony, the state court determined that one of the eyewitness identifications was highly reliable. App. 120a-21a. In light of this testimony, the state court determined any error in the judge's comment was harmless error. App. 120a ("in light of these identifications, the trial court's speculation as to defendant's motive for assaulting Nelson, will be construed as harmless error"). A fair minded jurist could agree that the state court's decision on harmlessness was correct. Owens has not borne the

heavy burden of showing "there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98. The Seventh Circuit erred in granting relief.

CONCLUSION

The Seventh Circuit applied a rule not clearly established in a holding of this Court, and failed to give proper deference to the state court adjudication of the claim. For these reasons, the Court should reverse.

RESPECTFULLY SUBMITTED.

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